United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7184 & 76-7185

United States Court of Appeals

For the Second Circuit.

B

P/S

THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC. and HENRY GIRWOOD,
Defendants-Appellants-Appellees.
Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRWOOD,
Defendant.
Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
JUN 25 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX.

Volume III—Pages 957a to End.

DANIEL J. COUGHLIN
Attorney for Defendants-Appellants-Appellees in Action No. 1 and Defendant-Appellant-Appellee in Action No. 2
110 William Street
New York, N. Y. 10038
BE 3-5010

MARTIN LASSOFF
Attorney for Plaintiff-Appellee-Appellant in Action No. 1 and Plaintiff-Appellee-Appellant in Action No. 2
160 Broadway
New York, N. Y. 10038
BA 7-1350

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

(9023)

Index to Appendix.

	Page
Docket Entries	2a
Complaint (Action No. 1)	6a
Answer (Action No. 1)	9a
Interrogatories (Action No. 1)	11a
Answers to Interrogatories (Action No. 1)	22a
Pre-Trial Order (Action No. 1)	32a
Complaint (Action No. 2)	38a
Answer of Defendant Domenico (Action No. 2)	41a
Transcript (First Trial)	43a
Opening Statement by Mr. Lassoff	45a
Opening Statement by Mr. Schultz	51a
Motions	391a, 536a
Requests to Charge	539a
Summation by Mr. Schultz	540a
Summation by Mr. Lassoff	561a
The Charge of the Court	588a

Page

Exceptions and Requests to Charge 605a

Verdict 610a

Motion to Set Verdict Aside 611a

Order-Judgment of Dismissal in Favor of Defendant, After First Trial 615a

Plaintiff's Notice of Motion for Judgment Notwithstanding Jury's Verdict in Favor of Defendant, or For a New Trial 616a

Affidavit of John A. Schultz in Opposition to Plaintiffs' Motion 631a

Reply Affidavit of Martin Lassoff in Support of Motion 640a

Opinion and Order by Metzner, D. J., Granting Plaintiffs' Motion to Set Aside Jury's Verdict 643a

Plaintiff's Notice of Motion to Amend Pre-Trial Order 645a

Defendants' Objection to Plaintiffs' Motion to Amend Pre-Trial Order 648a

Defendants' Notice of Motion to Amend Pre-Trial Order 651a

Defendants' Notice of Motion to Have Second Trial Heard Before Another District Judge 653a

Page

Affidavit of John A. Schultz in Support of Defendants' Motion 655a

Order Denying Defendants' Motion to Have Trial Heard Before Another Judge 658a

Transcript (Second Trial) 659a

Opening Statement by Mr. Lassoff 660a

Opening Statement by Mr. Schultz 669a

Motions 1327a

Requests to Charge 1331a

Summation by Mr. Schultz 1333a

Summation by Mr. Lassoff 1358a

The Charge of the Court 1384a

Exceptions 1399a

Verdict 1408a

Motion to Set Verdict Aside 1412a

Plaintiff's Request to Charge 1415a

Plaintiff's Second Part of Request to Charge 1417a

Defendants' Requests to Charge 1419a

Page

Questions Submitted to Jury 1426a

Memorandum by Metzner, D. J., Denying Defendants' Motion to Set Aside Verdict and Directing Entry of Judgment (Action No. 1) 1427a

Judgment (Action No. 1) 1429a

Defendants' Notice of Appeal (Action No. 1) 1431a

Plaintiff's Notice of Appeal (Action No. 1) 1433a

Judgment (Action No. 2) 1434a

Notice of Appeal of Defendant Domenico Bus Service, Inc. (Action No. 2) 1436a

Plaintiff's Notice of Appeal (Action No. 2) 1438a

TESTIMONY (FIRST TRIAL).

PLAINTIFFS' WITNESSES:

Chiarello, Angela:
Direct 292a
Cross 304a
Redirect 306a

Chiarello, Joseph A.:
Direct 284a

	Page
Chiarello, Thomas J.:	
Direct	54a
Recalled:	
Direct (continued)	157a
Cross	187a
Recalled:	
Cross (continued)	269a
Redirect	281a
Friedman, Dr. Arthur:	
Direct	217a
Cross	258a
Redirect	266a
Girwood, Henry:	
E. B. T.	372a
Kaplan, Dr. Lawrence:	
Direct	307a
Cross	342a
Redirect	354a
Seplaki, Dr. Les:	
Direct	356a
Cross	365a
Redirect	369a
Spitz, Dr. L. Jackson:	
Direct	109a
Cross	119a
Redirect	152a

DEFENDANTS' WITNESSES:

Page

Baird, Dr. Duke Barnett:
Direct 441a
Cross 470a

Girdwood, Henry D.:
Direct 396a
Cross 416a

Gould, Dr. Edward M.:
Direct 511a
Cross 519a

TESTIMONY (SECOND TRIAL).

PLAINTIFFS' WITNESSES:

Chiarello, Angela:
Direct 1132a

Chiarello, Thomas J.:
Direct 682a
Recalled:
Direct (continued) 908a
Recalled:
Cross 960a
Recalled:
Cross (continued) 993a
Redirect 1022a
Recross 1025a

DeVoy, Joseph:
Direct 989a
Recalled:
Direct (continued) 1026a

	Page
Friedman, Dr. Arthur:	
Direct	749a
Cross	782a
Redirect	807a
Recross	810a
Girdwood, Henry:	
E. B. T.	1051a
Hutchings, John Allen:	
Direct	878a
Cross	884a
Redirect	888a
Recross	902a
Redirect	906a
Kaplan, Dr. Lawrence I.:	
Direct	1069a
Cross	1104a
Redirect	1128a
Leone, Samuel P.:	
Direct	812a
Cross	829a
Redirect	868a
Recross	874a
Redirect	874a
Seplaki, Dr. Les:	
Direct	1031a
Cross	1039a
Redirect	1049a
Spitz, Dr. L. Jackson:	
Direct	933a
Cross	945a
Redirect	958a

DEFENDANTS' WITNESSES:

Page

Baird, Dr. Duke Barnett:
Direct 1188a
Cross 1223a

Girdwood, Henry D.:
Direct 1255a
Cross 1281a
Redirect 1322a

Gould, Dr. Edward M.:
Direct 1147a
Cross 1161a
Redirect 1186a

EXHIBITS (FIRST TRIAL).

PLAINTIFFS' EXHIBITS:

Admitted page

1. Photograph of accident scene 63a
2. Photograph showing bus shanty and wall 69a
3. Photograph of accident scene 71a
4. St. Vincent's Hospital record 81a
5. Richmond Memorial Hospital record 85a

	Admitted page
6. Record of Golden Isles Hospital, Hallandale, Florida	90a
7. Record of Memorial Hospital, Hollywood, Florida	159a
7A for Identification. Record of Memorial Hospital, Hollywood, Florida	250a
8. Income tax returns and W-2 forms of Thomas Chiarello for the years 1969 through 1972	173a
9. Myelogram taken at Hollywood Hospital in 1975	268a
10. X-rays taken by Dr. Friedman in May of 1973 and January of 1976	268a
11. Deposition of Henry Girwood	388a
12 for Identification. Examination before trial of Henry Girwood, taken March 21, 1974	371a
13. Photograph showing roadway leading to bridge	424a
14. Dr. Baird's report	488a
DEFENDANTS' EXHIBIT:	
A. Records of Dr. Spitz	150a

EXHIBITS (SECOND TRIAL).

Plaintiffs' Exhibits:

		Admitted page	Printed page
1.	Photograph showing trestle and access roadway to the Bayonne Bridge	891a	1422a
2.	Richmond Memorial Hospital records	720a	
3.	St. Vincent Hospital record	720a	
4.	Richmond Memorial Hospital bill	720a	
5.	Record of Golden Isles Hospital, Hallandale, Florida	730a	
6.	Record of Memorial Hospital, Hollywood, Florida	737a	
7.	Hospital record and myelogram of Memorial Hospital in Hollywood, Florida, for the admission of July 28, 1975	744a	
8.	X-rays taken by Dr. Friedman	781a	
9.	Photograph of accident scene showing lamp post	894a	1422a
10.	Photograph of accident scene	1289a	1424a
11.	Photograph of accident scene	897a	1424a

	Admitted page	Printed page
12. Income tax returns and W2 forms for the years 1969 through 1972	910a	
13. Golden Isles Hospital bill	927a	
14. Bill from Memorial Hospital in Florida	927a	
15. X-rays taken at Golden Isles Hospital	1071a	
15A and 15B. X-rays	1228a	
16. Myelogram	1086a	
16A, 16B and 16C. Myelograms	1088a	
DEFENDANTS' EXHIBITS:		
A. X-rays taken by Dr. Baird	1206a	
B. Photograph showing area of roadway near the scene of the accident	1264a	
C for Identification. Photograph showing Kennedy Boulevard	1322a	
COURT'S EXHIBITS:		
1. Note from jury	1404a	
2. Note from jury	1406a	
3. Note from jury	1408a	
4. Note from jury	1408a	

Q So the record of treatment was from July 5th you didn't see him again until September, is that correct?

A That's correct.

Q Then from September you didn't see him until January?

A That's correct. If it says so there.

Q Doctor, did you make this record on each occasion this man came to you?

A Every time he came I scribbled --

Q You have your back to the jury. They can't hear you.

Did you make this record each time this man came or did you take this record from some place else?

A No, each time he came I wrote down.

Q Doctor, when I last saw this card was it a lot cleaner than it is now?

A I didn't have it in all the interval. I didn't have it.

MR. LASSOFF: I had that card with all other exhibits in my possession until yesterday when I gave it back to the doctor.

Q Doctor, you haven't seen this gentleman except sometime in January and now, is that right?

A Are you talking about Mr. Chiarello?

Q Yes.

gw/lf Spitz-Cross 300

A I saw him I think at a funeral once.

Q Incidentally, isn't his father-in-law's name Mr. Cardillo?

A It is, yes.

Q Didn't you know Mr. Cardillo at least two years before this accident?

MR. LASSOFF: Objection.

THE COURT: He said five or six years from now. That would take you back to 1970. He answered that question.

A Yes, I did know him at that time you are talking about.

MR. SCHULTZ: I have no further questions of this doctor.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Doctor, you were asked whether or not in your opinion Mr. Chiarello was hypertensive at the time you saw him and you answered no. Would you tell us why your answer was no?

A Because I felt with a mild weight reduction he could bring his blood pressure within normal range and anyone who can bring their blood pressure down with weight reduction per se without taking medication is not considered by me

gw/lf Spitz-Redirect 301

to be hypertensive.

Q Doctor, would it be a fair statement to say that you, yourself, are overweight?

A Yes, I am overweight.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q Doctor, besides the record of the myelogram that you received, did you receive reports from other doctors from July of 1972 through the period of time you were treating him, I believe July 30th, '73?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I did.

Q What reports of what doctors did you receive?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Well, I got a report from Richmond Memorial Hospital.

Q Just tell us the names now, Doctor.

A Dr. Lanier, Dr. Urs. That's it.

Q Would you tell me the date of the report you got from Dr. Urs?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. LASSOFF: No further questions, your Honor.

gw/lf 302

THE COURT: You may step down.

(Witness Excused)

THE COURT: Do you want to continue with your cross examination, Mr. Schultz?

MR. LASSOFF: He hasn't started with the plaintiff.

THE COURT: I know.

MR. SCHULTZ: I would like to have a few minutes to look over some notes.

THE COURT: I have to work until one o'clock. Let's go.

Put the plaintiff back on the stand.

T H O M A S C H I A R E L L O, resumed.

THE COURT: You may proceed.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Mr. Chiarello, first of all, sir, how old are you now?

A 39 years old, sir.

Q Mr. Chiarello, what is your present weight?

A Right this moment?

Q Within the last few days, week?

A 255.

Q And your height, sir?

A 6-2½, sir.

Q Mr. Chiarello, you went to work in 1961 for American Stevedores, is that right?

A Yes, sir, I did.

Q American Stevedores at that time, as I recall, was owned by Gus Blair Chiarello, is that right?

A You are wrong.

Q Were the principals Gus Blair, James Chiarello, Joseph Chiarello, Richard Chiarello?

A You left one out.

Q Who else?

A Mr. Dick Chiarello.

Q That is Richard, isn't it?

A No, sir, it is not.

Q Dick Chiarello?

A No, you are wrong, sir. Mr. Dick Chiarello plus a Richard Chiarello.

Q These were all relatives of yours, isn't that true?

A Yes, sir, they were.

Q Some were your uncles and some was your father?

A One my grandfather.

THE COURT: One was his father.

A One was my grandfather, too.

Q Sir, that American Stevedores somewheres in 1967 was merged or taken over by Universal, isn't that right?

A They were absorbed by Universal, yes.

Q Sir, was there another Chiarello family related to you that owned another stevedoring outfit?

A Yes, sir.

Q Which one was that?

A Pittston Stevedoring, sir.

Q Pittston Stevedores?

A Yes, sir.

Q When you went to work for American Stevedores in 1961, how long was it before you became a ship superintendent?

MR. LASSOFF: Ship foreman.

A How long before I became a ship superintendent?

Q Yes. When did you go to work for them?

A When I was eight years old, Mr. Schultz.

MR. SCHULTZ: I move to strike it.

Q When did you go to work for them in 1961?

THE COURT: Now you changed the question. Your question was when did he go to work for them.

MR. SCHULTZ: If your Honor please, he testified that he went to work for them when he came out of the service in 1961.

THE COURT: I don't care what he said. Your question to him was, "When did you go to work for them?"

When did you go to work for them full time, Mr.

Chiarello?

A 1961, sir.

Q And, Mr. Chiarello, you have testified before, have you not, sir?

A Where? Pertaining to this case, sir?

Q Sir, you have given testimony before, have you not?

A Yes, sir, I have.

Q All right.

Before you got on this stand today, did you look at your prior testimony?

A Yes, sir, I did.

Q And you read it?

A Yes, sir, I did.

Q And did you discuss your proposed testimony both -- when did we start? -- Wednesday and today with your lawyer before you got on the stand?

A Together we went over the transcripts that you are speaking about, sir.

Q So you know pretty well what you testified to on prior occasions, isn't that true?

A Pretty well, sir, I guess you might say that, yes. Not by memory, sir.

Q What I want to know, sir, is when you went to work full time for American Stevedores, the organization owned and

controlled by your family, how long was it before you became a ship superintendent?

MR. LASSOFF: Your Honor, may I object to the continued "owned and controlled by your family"?

THE COURT: Your witness.

Go ahead.

A It was a few months afterwards, sir.

Q Incidentally, sir, your father now lives in Florida, does he not?

A Yes, sir, he does.

Q How far does he live from you?

A About 30 minutes away, sir.

Q Sir, is it a ship superintendent or a ship foreman? What is the correct terminology?

A Usually the terminology of ship foreman is the member of the union who has worked his way up to be ship foreman in charge of the ship. The ship superintendent is in charge of the foreman and everybody else.

Q You were the ship superintendent, were you not?

A Yes, sir, I was.

Q Now, sir, after awhile how long was it before you became a pier superintendent?

A A couple of years after that.

Q That would put it in 1963?

A I think that's fair enough, sir. That's close enough, yes.

Q You worked as a pier superintendent until 1967, is that correct?

A Yes, sir, until --

Q November?

A Yes, sir, that's correct.

Q And then it was taken over by Universal, American was taken over by Universal?

A It was absorbed by Universal, yes, sir.

Q Sir, did your relatives remain with Universal?

A As I explained, sir, for that period of one year. That's all.

Q They stayed on for a year?

A Yes. That was the trial period, sir.

Q And you continued on after that, did you?

A Yes, I continued on after that.

Q Did any of your relatives continue on?

A Yes, sir, one, two others and all the rest were let go.

Q Sir, how many piers in all did American Stevedores have the contracts for say in the year 1971?

MR. LASSOFF: Objection, your Honor. American Stevedores was not in business in 1971.

Q Universal.

A I would have to -- in 1971, sir, I don't know. I couldn't tell you. You want me to --

THE COURT: All he wants to know is if you know.

THE WITNESS: I don't know.

THE COURT: Next question.

Q Going back to the scene of this accident, Mr. Chiarello, did you read the transcripts with relation to the happening of the accident carefully before you got here?

A Sir, you asked me if I read the whole transcript.

Q Did you read it carefully with particular attention to the happening of the accident?

A Not any more carefully than I read the rest of the transcript, sir.

Q At the time of the accident, sir, was it raining or not?

A No, sir, it was not raining.

Q Were you here when the retired police officer was testifying?

A Yes, sir, I was.

Q And you had testified previously that it wasn't raining, isn't that true?

A That's right, it's true.

Q One of the purposes of reading this transcript, I assume

was that you would not testify at variance today with what you had done in the past?

MR. LASSOFF: Objection.

THE COURT: Sustained. There is no proof in this record how long after the accident Mr. Hutchings appeared. The witness says it wasn't raining at the time of the happening of the accident, and Mr. Hutchings said it was raining when he got there. I don't know how long a period of time there was between the two.

MR. SCHULTZ: If your Honor please, I will clear it up.

THE COURT: Good.

MR. SCHULTZ: Thank you.

Q Was it raining, sir, when Mr. Hutchings came to the scene of the accident?

A I do not believe so, sir, to the best of my recollection.

Q Now, sir, you told us, too -- I think you told us on March 3rd that the speed limit was 20 miles an hour?

A Yes, sir, if I am not mistaken there is a sign there.

Q It says 20 miles an hour?

A Yes. It says right lane -- 20.

Q Does it say 20 miles an hour?

A Yes, sir, it did. I am sorry.

Q Sir, did you testify as to the speed limit at any prior time?

A To what? To just the other day? Yes, I believe I did, sir. I believe I was asked. I can't be positive. A I told you I didn't memorize that record you have got there, sir.

Q I would like you to take a look at it, if you would -- withdrawn.

And you say you definitely saw a sign there that says 20 miles an hour?

A To the best of my memory, it says ramp speed 20 miles an hour, sir.

Q Where was that, sir?

A That's prior to getting to the trestle that's on the Bayonne side or the Jersey side of the trestle. There was a sign there, sir.

Q Now, sir, how long before the occurrence was it that it stopped raining?

A Approximately five or six blocks prior.

Q In point of time?

A I couldn't tell you. I don't know. How do you mean in point of time?

THE COURT: How many minutes?

THE WITNESS: About five minutes, roughly.

Q Now, sir, I believe that you also told us on March 3rd -- withdrawn.

Now, sir, as you went towards the trestle, did there come a time when there was a downgrade which led to an area underneath the trestle?

A Yes, sir, the road is lower under the trestle, yes, sir.

Q Is there a downgrade before you get to that point?

A Yes, sir, there is.

Q Sir, there then is a level area underneath the trestle, isn't there?

A You are correct, sir.

Q What is the distance of that level area underneath the trestle, your best estimate?

A Longer than the bus, which I am figuring at 40 feet. Maybe 60, maybe 80 feet, 90 feet, something like that, I would guess.

Q The level area under the trestle --

A You are talking about the level area under the trestle?

Q -- is between 60 to 90 feet, is that right?

A Roughly speaking, yes, sir.

Q And then there is a point where the roadway begins

to go up, is that correct?

A Yes. You come out from under the trestle and you come out but then there is a very, very gradual rise towards the bridge ramp itself.

Q Sir, at the point where this occurrence took place is the road an upgrade?

A Yes, sir, it is, a slight upgrade, sir.

Q It's an upgrade all the way from the level area of the trestle to the point where the accident took place, isn't that true?

A Yes, sir, it is. Yes, sir. Slight grade.

Q What is the distance between the point where one starts to go up this grade to the point where the accident happened? In other words, from the trestle.

A From his trestle end on the bridge side, not on the Jersey side, from the bridge side of the trestle end, to the point where the occurrence happened would be, I would say, 100 to 150 feet, roughly, sir.

Q 100 to 150 feet?

A Yes, sir. That's rough, sir.

Q As opposed to 150 yards as testified by the police officer, is that correct?

MR. LASSOFF: Objection, your Honor. It is not opposed to anything. It's his testimony.

THE COURT: It's his testimony, Mr. Schultz.

Q Did you hear retired police -- not policeman -- Port Authority --

THE COURT: I thought I made it clear I don't take asking a witness about what somebody else said. Just get his story. You can sum up to the jury on the conflict between testimony. All right?

MR. SCHULTZ: Yes, sir.

THE COURT: Good.

Q Now, sir, how fast were you going when you went down the grade towards the trestle, to get to the trestle?

A Approximately 15. Between 15 and 20 miles an hour.

Q And you were on your way home, were you?

A Yes, sir, that's correct.

Q Were there any cars immediately in front of you?

A Not immediately in front of me, sir. There were the two cars that I eventually -- one of the cars was involved in the accident.

Q Mr. Chiarello, what I want to know is were there any cars immediately in front of you?

A No, sir, there were not.

Q How far in front of you was the nearest car when you were going 15 or 20 miles an hour?

A Let's say about 75 feet from me.

Q Before you got onto this access road that led towards the trestle area, you had made a left-hand turn, did you?

A Yes, sir. There is a light. It's not a complete left, though, sir, it's only a one-third left, sir.

Q Mr. Chiarello, did that lead off of Kennedy Boulevard?

A I don't know.

Q Sir?

A I don't know the name of the street, sir.

Q This access road as you were going down underneath the trestle, how wide was it?

A Before I got to the trestle, sir? That's the access road going down before you reach the trestle?

Q Just before you get to the downgrade.

A Two lanes wide.

Q How many lanes were there as you came out from underneath the trestle to go up?

A Two lanes, sir.

Q How many lanes were there at the scene of the occurrence?

A One lane, sir.

Q Incidentally, Mr. Chiarello, with relation to these pictures, you told us you took these pictures in January of 1976, isn't that true?

A I think it was.

Q Is that correct?

A I think it was January. It was prior to what you were talking about before.

THE COURT: This January is what he is asking.

THE WITNESS: I think it was, sir.

Q Mr. Chiarello, isn't it true, sir, that you took those pictures within a day or two prior to January 13, 1976?

THE COURT: He said January. There is nothing conflicting with his story unless you want to pinpoint an exact date.

MR. SCHULTZ: That is what I would like to do.

THE COURT: Then ask him.

Q Do you know when you took them?

A No. They were in January.

Q Do you know what day of the week it was?

A I believe it was a Sunday.

Q It was a Sunday?

A I believe so, sir.

Q How did you get to the scene of the accident to take those pictures?

A My wife drove me, sir.

Q Did you go out into the roadway to take those pictures?

A My wife and I both went, sir.

Q You went out into the roadway?

A My wife and I both went, sir.

Q Sir, did you go out?

A My wife and I both went.

Q Did you take the pictures?

A Yes, sir, I did.

Q And would you tell me, sir, before you marked those pictures today had you marked them before?

MR. LASSOFF: If your Honor please, we are running into an area --

THE COURT: Sustained.

MR. SCHULTZ: If your Honor please, may we go to the side bar?

THE COURT: Yes.

(At the side bar)

MR. SCHULTZ: If your Honor please, this man's credibility is at issue and has been at issue. A police officer, a retired police officer, said there were two lanes. He says there is one lane.

MR. LASSOFF: So does your bus driver.

MR. SCHULTZ: He is being asked if he marked the pictures before. That isn't saying to anybody there was another trial.

THE COURT: No, but there are no pictures before as to where he marked them before because they were erased at your request.

MR. SCHULTZ: I didn't request.

THE COURT: You made the objection that there were markings on it.

MR. SCHULTZ: I didn't ask they be erased.

THE COURT: There was no way to make them admissible without erasing them.

MR. SCHULTZ: He could have gotten other pictures?

THE COURT: When? The trial was on.

MR. SCHULTZ: He knew it was coming up.

THE COURT: That's all right. I will take it the way it is. I will sustain the objection.

(In open court)

BY MR. SCHULTZ:

Q Mr. Chiarello, with relation to Plaintiff's Exhibit 11, how wide do you say that roadway is?

A With this picture right here, sir, it would be almost --

Q I am not asking about the picture. I want you to look at the picture and tell me how wide that roadway is --

THE COURT: That's his po'nt. You are asking him to look at the picture. Take the picture away and ask him

how wide the roadway is. You don't have to give him the picture to ask him how wide the roadway was.

Q I want you to look at this picture which is Plaintiff's Exhibit 11 and I want you to look at Plaintiff's Exhibit 9.

A Yes, sir.

Q I believe you have marked on there where you say the accident took place.

A Yes, sir.

MR. SCHULTZ: Do you want me to take the pictures away?

THE COURT: You can leave them. The question doesn't have to have reference to the picture.

Q How wide is the roadway, sir, at the point where you say the accident took place?

A It's wider than the bus and I would give the bus approximately ten feet, a couple of feet on either side. Fourteen or fifteen feet, I would say, sir. I forget, sir.

Q Now, Mr. Chiarello, when you went to take those pictures that you took there, did you use a Polaroid camera?

A Yes, sir, I did.

Q What were the weather conditions at the time you took the pictures?

MR. LASOFF: Objection, your Honor. I don't see

any relevance.

THE COURT: Overruled.

A There was a mixture of rain and snow, sir.

Q Was there snow on the ground?

A Yes, sir, there was.

Q Who drove the car to the scene of the occurrence?

A Sir, I told you that. My wife did.

Q Your wife drove?

A Yes, sir.

Q And you drive a car, though, don't you?

A Yes, sir, I do.

Q You drive a car in Florida, don't you?

A Yes, sir, I do.

Q And you are licensed to drive a car?

A Yes, sir, I am.

Q How many times a week do you drive a car now?

A In Florida, sir?

Q Yes.

A On an average, maybe twice a week, sir, or whenever it's necessary. If my wife is sick and the kids have to go to the ball field --

MR. SCHULTZ: Move to strike it.

Q I asked you how many times a week.

A Maybe twice a week. I am sorry, Mr. Schultz.

Q Incidentally, Mr. Chiarello, when you were asked about being in high school, you went to a private academy, didn't you?

A Yes, sir, I did.

Q It was a military academy, wasn't it?

A Yes, sir, it was.

Q Sir, you played high school football there, at the equivalent of high school football, did you not?

A It is high school football, sir.

Q You played in the tackle position, did you not?

A Yes, sir, I did.

Q And what weight were you?

A 235 pounds, sir.

Q How old were you then?

A Senior year, eighteen, sir.

Q What was the name of that school?

A McDonogh School.

Q And, sir, when you were playing football, I assume, sir, that you received some blows in and about your head and your neck and your back, didn't you?

A Yes, sir, I did.

Q And for how many years did you play football?

A I think from the second grade on, sir.

Q How many years did you play high school football?

A Three years, sir. Senior varsity and varsity both.

Q Sir, did you play any football while you were in service with any of the service teams?

A The last football game I played was December, 1955. I have not played since.

Q Where was that, sir?

A In high school, sir.

Q In other words, you did not play on any of the service teams?

A No, sir, I did not.

Q Now, sir, with relation to the work that you did --

A Yes, sir.

Q -- you worked on these various piers from '61 until 1972?

MR. LASSOFF: Objection, your Honor. He has testified he has worked on these piers since he was eight. We are now limiting him --

MR. SCHULTZ: I will ask him, Judge, as long as he wants me to.

Q Were you working as a stevedore when you were eight years old?

A I didn't hear that.

Q Were you working as a stevedore when you were eight years old?

A Yes.

Q You were working on the docks as a licensed stevedore when you were eight?

A No. You didn't say a licensed stevedore. No, sir.

Q And you were unloading and loading ships when you were eight?

A No. I was helping with the trucks when I was eight.

Q Sir, did you discuss that with your lawyer before you got here today?

A No, I did not, no, sir.

Q Did you testify to that before?

A Yes, I testified to that before. You asked me that question before.

Q You were working on ships when you were eight?

A No. I said --

THE COURT: He said he was working as a stevedore helping with the cars.

A With the trucks.

Q Did you say that, you were working with trucks before?

A No. You didn't ask me what part I was working with, sir. You only asked me when, and I told you eight before, sir.

Q In any event, sir, when you went to work after the war as a stevedore -- not the war -- 1961 --

A Yes.

Q -- you worked on various docks, did you not?

A Yes, sir, I did.

Q And you worked on various docks that were controlled by your family, isn't that true, the stevedoring aspect of it?

A Yes, we held the contract on certain piers, yes, sir.

Q Sir, you were not a union member, were you?

A No, sir I was not. It is against --

Q So you were not a union member?

A No, sir.

Q Sir, during the course of this period of time, approximately eleven years working, you had to lift certain objects, did you not?

A Yes, sir.

Q And, sir, would it be fair to say that you lifted objects almost every day?

A I believe it would be fair to say that, yes, sir.

Q And the weights that you kept lifting varied, as I recall -- well, you tell us. What were the weights, from one pound to what?

A Say a hundred pounds, sir.

Q And also, sir, with relation to the railroad cars, you had to work these doors, did you not?

A Yes, sir. Well, you unlock them and then open them.

Q On some occasions I assume they were difficult to move, is that right?

A Yes, you are correct.

Q And you would have to pull them?

A You would try, yes.

Q And they would have to be pulled along tracks?

A Yes, sir.

MR. SCHULTZ: Do you want me to keep going?

THE COURT: Sure.

Q And you had to pull these alon; these various tracks, is that correct, sir?

A Yes, sir, they ride in tracks.

Q And that required a certain amount of energy, did it not?

A Yes. You exerted enough energy until you realized that the door wouldn't open.

Q Sir, did that at times require a twisting motion?

A I don't know what you mean by that, sir.

Q Did you have to pull the door this way and pull it

out this way along the tracks?

A You would reach in like this, brace yourself and pull it to get it open. If it would not --

Q Not towards you, you would pull it sideways, wouldn't you?

A No, you would never do that. You pull it this way. You have no leverage by trying to pull something in front of you like this. You have no leverage whatsoever.

Q So you pulled it towards you?

A Yes, you have to pull it towards you.

Q Parallel, sideways?

A Yes, this way (indicating).

Q Sir, how many hours a day do you say you worked?

A Anywhere from eight to 24 hours a day.

Q Now, sir, with relation to this job that you did, you tell us that you never injured your back before?

A No, sir, I never have.

Q Prior to this occurrence you never had any pains in your back?

A No, sir, I never did.

Q Mr. Chiarello, for how long had you had pains in and about your stomach area before it was diagnosed as a hiatal hernia?

A About three hours.

Q Had you ever had pains before that?

A Upset stomach. I am not talking about pains. Mr. Schultz, you mentioned pains. It was only three hours between this onset of pains and the diagnosis.

Q Had you had gas before?

A Yes, sir.

Q Had you had complaints with relation to the smoking of cigarettes before this?

A As to what, sir?

Q In and about your stomach and chest area.

A No, not the smoking, no.

Q Had you had complaints of pain in and about your chest area before this diagnosis was made?

A No. You mean gas? You just asked me gas. I said yes, gas.

Q When was the diagnosis of a hiatal hernia made, Mr. Chiarello?

A In August of '73, I believe it was, sir.

Q Had you made complaints about that because of frequent indigestion?

A I had gas. I took Alka-Seltzer for it, but as to noticing, did I go around telling people about it or even telling doctors about it, I don't know, sir. I could have.

Q Did you say that this occurred after you used spicy

gw/lf Chiarello-Cross 327

foods and alcohol?

MR. LASSOFF: What, your Honor, the gas or what? I don't understand what he is referring to occurred.

THE COURT: It is not quite clear, Mr. Schultz.

MR. SCHULTZ: I will read it from the record.

THE COURT: Give us a frame of reference so we know what you are talking about.

MR. SCHULTZ: All right, your Honor.

Q Have you looked at this hospital record?

A I don't know which hospital record it is.

Q The Golden Isles Hospital record.

A I am sorry. I didn't know. No, I have never seen that.

Q You have never seen it?

A Not that I know of.

Q Did you ever see the report of Dr. Treiber?

A Nobody ever shows you those things. Not the patient they don't show you.

Q Let me ask you this: you tell us that this diagnosis was made of a hiatal hernia in August of 1973?

A Yes, sir.

MR. SCHULTZ: If your Honor please --

THE COURT: Just finish this area, this hernia.

MR. SCHULTZ: All right.

Q Did you complain of frequent indigestion, sir?

MR. LASSOFF: To who, when, sir?

Q Before you had this diagnosis.

A Sir, I could have told people that I had gas and I took Alka-Seltzer.

Q Who made the diagnosis of a hiatal hernia?

A A doctor in Hollywood, Florida. If you would like his name, I'd have to ask my wife. I don't remember his name, sir. He's a -- all right, go ahead.

Q Did you make a complaint, sir, that this occurs, this indigestion, occurs after spicy foods and alcohol?

A To whom?

Q To the doctor or anybody.

A No. When I went there I was in pain, stomach and chest pains. After his examination --

Q Sir, I just wanted to know if you had made complaints that it happened after spicy foods and after alcohol?

A I very well could have. I don't know. I had just gotten off the plane a couple of hours before that, sir.

Q Did you also complain of the fact that cigarettes give you a lot of gas?

A I might have. I don't know. I don't think so.

MR. SCHULTZ: Do you want to cease now?

THE COURT: Are you finished with that area?

MR. SCHULTZ: Not all the way.

THE COURT: Are you finished with the area regarding the hernia?

MR. SCHULTZ: Not really, Judge.

THE COURT: Then continue.

Q How long before this diagnosis of a hiatal hernia was brought about did you complain of chest pains?

A I never complained of chest pains.

Q I thought you just told us that you arrived with chest pains and stomach pains.

A Three hours.

Q Not before that?

A No.

Q How long was it that you complained about having indigestion after the ingestion of spicy foods and alcohol?

A I don't remember saying it. I tried to answer you before, sir, that I might have said it but I didn't remember it, sir.

Q You don't remember it?

A No, sir.

Q Do you remember that you did have pains and indigestion after you ingested alcohol?

A I know I used to have gas once in awhile and I used to take Alka-Seltzer for it, sir.

Q About how long before?

A I don't know, Mr. Schultz. I really don't, sir.

MR. SCHULTZ: That's all, your Honor, in that area.

THE COURT: We will adjourn for lunch. Return at 2:15.

(Luncheon Recess)

AFTERNOON SESSION

March 5, 1976
2:15 p.m.

(Jury present)

MR. LASSOFF: Your Honor, Mr. Schultz has consented to let the pay man from Universal take the stand.

THE COURT: All right.

J O S E P H E D W A R D D E V O Y, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Mr. DeVoy, by whom are you employed?

A Universal Maritime Service.

Q And how long have you been employed by Universal Maritime Service?

A Fourteen years.

Q What is your job with Universal Maritime Service?

A I am the assistant manager in the office.

A Of the office?

A That's right.

Q Does that include payroll?

A That's right.

Q How long have you had that job?

A For about eight years.

Q Now, was Universal Maritime Service served with a subpoena by me with regard to certain records?

A They were.

Q Did you bring the records that were subpoenaed to court with you today?

A Yes, I have.

Q Sir, are all terminal superintendents paid basically the same salary?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, they are.

Q And is there any difference they have due to seniority rather than job?

A That's right, strictly seniority.

Q At my request did your department search for and locate a terminal superintendent with the same seniority as Mr. Chiarello who is still currently employed by Universal Maritime Service?

A Yes, we did.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q Was this man employed by Universal Maritime Service as of June 30, 1972?

A That's correct.

Q Did you bring that man's payroll records with you?

A Yes, I have them with me.

Q Sir, can you tell me for the fourth quarter of 1971 what Mr. Chiarello earned?

A $4,524.98.

THE COURT: How much?

THE WITNESS: $4,524.98.

Q And this other gentleman?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: There are overtime factors here, are there not?

Q Does overtime play any significant factor in your calculations?

MR. SCHULTZ: Objection.

THE COURT: $50 a day twice a week is $100.

Q Sir, do all of your terminal superintendents work approximately the same hours?

THE COURT: What was the base pay? That's what we want to know.

Q What is the base pay?

MR. SCHULTZ: Of whom, if your Honor please.

THE COURT: Both of them.

MR. SCHULTZ: I respectfully object.

THE COURT: Overruled.

A I can give you the figures that I have here.

Q All right.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q Sir, can you call your office and get that information for me?

A Yes, that's right.

MR. LASSOFF: May I have him do that and put him back?

THE COURT: Do you want any records on again? Base record for the two men. What is the name of the man you say has the same seniority as Mr. Chiarello?

THE WITNESS: I don't have that name.

THE COURT: How do we know who that is?

MR. LASSOFF: They blank it out. They say it is confidential information. They blanked it out in the W2 forms they brought.

THE COURT: How can you find out whether the man has the same seniority as Mr. Chiarello?

MR. LASSOFF: He checked it.

THE WITNESS: This was checked. It was someone employed at the same time.

THE COURT: For the same length of time?

THE WITNESS: That's right.

THE COURT: Not longer?

THE WITNESS: No.

THE COURT: All right. I will take it. Get me the base pay.

MR. LASSOFF: Would you make a telephone call.

(Witness leaves stand)

THE COURT: Put your client back on the stand.

MR. SCHULTZ: It would be interrupted, if your Honor please.

THE COURT: I am not going to sit around doing nothing, Mr. Schultz. It is the third day of the trial. I have other trials and we have to move it along.

Come on back on the stand.

MR. LASSOFF: May I tell the man to find the base pay for every year since then, your Honor?

THE COURT: Yes.

THOMAS CHIARELLO, resumed.

THE COURT: You may proceed.

CROSS EXAMINATION CONTINUED

BY MR. SCHULTZ:

Q Mr. Chiarello, to get back to the scene of this accident, from the point underneath the trestle where you come out underneath the trestle to go up towards the bridge,

gw/lf Chiarello-Cross 335

is that a continuous upgrade?

MR. LASSOFF: Objection, your Honor. We already covered that in cross examination.

THE COURT: Overruled.

A A slight upgrade. You mean going up to the ramp?

THE COURT: From the time you come out from under the trestle.

THE WITNESS: It's a very slight upgrade.

Q Does it continue all the way up to the bridge?

A No, sir, it does not.

Q Where does it stop?

A It flattens out just ahead of where the bus hit me, sir.

Q For how long a distance do you say it flattens out?

A It flattens out -- it's approximately the length of a car, if not a little bit longer.

Q Did this occurrence, sir, take place at a point where there was a slight upgrade?

THE COURT: You mean where his car was hit?

MR. SCHULTZ: Yes.

A Yes, sir.

Q And, sir, from the point of the impact until you go up to the bridge, is there a continual upgrade?

A No, sir.

gw/lf Chiarello-Cross 336

Q Do you remember these questions and answers, sir:

"Q Sir, did this occurrence -- did this actual impact, did that take place while your vehicle was on a slight upgrade?

"A Extremely slight upgrade, yes, sir. I would say slight, yes, sir.

"Q Sir, for how long a distance ahead of you was this upgrade?"

If your Honor please, I am in a quandary, I think I had better ask you about this.

(At the side bar)

MR. SCHULTZ: The Court has put questions.

THE COURT: Just leave that out.

MR. SCHULTZ: I didn't want to leave the colloquy out.

THE COURT: Leave these two out.

MR. SCHULTZ: Leave it out?

THE COURT: Sure.

MR. SCHULTZ: All right.

Can we have this marked?

THE COURT: Mark what?

MR. SCHULTZ: What I have to leave out.

THE COURT: The question is was he asked that question and did he give that answer.

(In open court)

Q Sir, do you remember these questions and answers at the previous testimony given by you:

"Q Sir, did this occurrence, this actual impact, did that take place while your vehicle was on a slight upgrade?

"A Extremely slight upgrade, yes, sir. I would say slight, yes, sir.

"Q Sir, for how long a distance ahead of you was this upgrade?

"A From the point of impact it goes up to the bridge and then you continue up to the top of the bridge.

"Q It is a continual upgrade?

"A From the point of impact you have a slight grade. Then you go up even more, yes, sir, you do.

"Q In other words, the contour of the road was continually upgrade from the point where you were?

"A Increasing as you went further up, yes, sir."

Do you remember those questions and answers, sir?

A That's all there is to it?

THE COURT: That's all.

A Yes, I do remember that.

Q Do you remember you gave that testimony?

A Yes, I do.

Q Sir, did that roadway in front of you and in front of this level place about the length of a car, did it continue upgrade towards the bridge?

A Where I was struck was on --

Q Sir, can you answer the question, please?

A No, I cannot. You will have to repeat the question.

MR. SCHULTZ: Would the reporter read it?

THE COURT: Read the question back.

(Question read)

A Yes, sir, a slight upgrade towards the bridge, yes, sir.

Q And behind you, sir, was a downgrade towards the level area under the trestle?

A Very slight, sir, yes.

Q So that from the trestle on up there was an upgrade, is that correct?

A Not the way your hand is indicating, sir. I'm sorry. That is not the way it was, sir.

Q Sir, are you saying that my hand is indicating a grade?

THE COURT: Absolutely, starting from your waist and going up to your nose. That indicates a large upgrade.

He is making a point it is a slight upgrade.

MR. SCHULTZ: May I respectfully except, your Honor.

Q Now, sir, can you tell us the degree of this grade?

A No, sir, I cannot. All I can tell you it is a very slight grade up to the point where it levels off and on the puddle was that we stopped prior to. Then it starts a gentle upgrade again, sir.

Q Sir, how many times did you go over this testimony before you got on the stand today?

A Once completely and last night I read three pages.

Q Now, sir, this dip that was under the trestle, was that the lowest point in the roadway?

A Yes, sir.

THE COURT: From where to where?

MR. SCHULTZ: The dip under the trestle, your Honor.

THE COURT: In this roadway. I am asking this roadway starts some place and ends some place.

MR. SCHULTZ: All right, your Honor.

Q Was it the lowest point in the roadway of this access road?

A Yes, sir, it is.

Q Now, sir, how long do you say you were stopped before an impact took place?

A Three seconds, four seconds, around there. Three,

four, five seconds, around in there.

Q Sir, at the moment of impact was the car in front of you moving, standing still or don't you know?

A I do not know, sir.

Q You do not know?

A No, sir.

Q Now, sir, do you know -- can you tell us where you first saw this bus, where it was after you came to a stop? Where was this bus?

A Where was this bus when I came to a stop? The bus was in the dip under the trestle.

Q Did you ever testify that it was coming out of the dip?

A Gee, I don't know, Mr. Schultz. You just asked me. I said the bus was in the dip.

Q All right. How far behind you was that?

A The trestle I'd say is a hundred to 150 feet behind where the accident occurred, sir.

Q I want to know how far behind you was the bus when you first saw it after you came to a stop?

A After I came to a complete stop, I would say if it's one hundred to 150 feet, the bus must have been probably 175 feet behind me, maybe 135 feet behind me, depending upon the distance.

Q Between 135 and 150 feet, 175 feet?

A Right around in there, yes, sir.

Q Sir, how much time took place between the time you saw the bus -- withdrawn.

How much time took place between the time you first saw the bus and the time of the impact as you say coming out of the trestle or in the dip?

MR. LASSOFF: Your Honor, objection. There is no basis. He was asked after a full stop where was the bus. Now we are asking a different question.

THE COURT: The point we are at is when you got the witness stopped, Mr. Schultz. He wants him to testify how much time elasped before impact after he came to a complete stop, is that it?

MR. SCHULTZ: No. I want to know how much time it was between the time he saw this bus and the time of the impact.

A Between the time I first saw the bus?

Q No. You told us that you saw this bus in your rearview mirror when you came to a stop, isn't that true?

A We are not quite together, Mr. Schultz.

Q All right, sir, you tell me. Did you see this bus in your rearview mirror?

A Yes, prior to stopping, sir.

gw/lf Chiarello-Cross 342

Q Did you see it after you stopped?

A Yes, sir, I did.

Q When you saw it after you stopped, how far behind you was the bus?

MR. LASSOFF: We just had that answer.

THE COURT: No. Answer the question.

A After I stopped the bus was approximately -- was anywhere from 135 feet to 175 feet behind me. That's rough, sir.

Q Is that when you looked in your rearview mirror?

A I looked in my rearview mirror a couple of times.

THE COURT: After you came to a stop?

THE WITNESS: After I came to a stop I looked in my rearview mirror.

THE COURT: And saw the bus?

THE WITNESS: Yes, sir.

THE COURT: And at that time you say it was 135 feet to 175 feet?

THE WITNESS: Yes, sir.

THE COURT: You have the distance.

Q How much time took place from the time you saw the bus as you told us until there was an impact?

MR. LASSOFF: Does this mean after he is at a full stop or before?

THE COURT: No, it is not. It is perfectly clear that he is being examined after he came to a stop.

MR. LASSOFF: All right.

A As I said before, Mr. Schultz, approximately three, four, five seconds, something like that, sir.

Q Did you continually watch this bus?

A No, sir, I did not.

Q What did you do?

A I looked for a place to go right or left of the car in front of me so I would not be hit.

Q And at that time was the car stationary or moving or don't you know?

A Which car are you talking about?

Q The car ahead of you.

A He was stopped at that time.

Q Didn't you just tell us you didn't know whether it was moving or not?

A That is not what you asked me.

MR. LASSOFF: Objection.

THE COURT: Not on that state of facts.

Q Sir, did you tell us that at the time of the impact you did not know whether the car in front of you was moving or not?

A Yes, sir, I did.

THE COURT: That is not the same as the question you are now asking him.

Q Did you keep that car in front of you under observation?

A No, sir, I did not.

Q Did you look in the mirror again?

A Yes, sir, I looked up in the rearview mirror. I took my eyes off him and looked in my rearview mirror.

Q Did you keep your foot on the brake?

A Yes, sir. I came to a stop.

Q Did you keep your foot on the brake?

A Yes, sir, I did, sir.

Q Did you attempt to move forward before the impact?

A I couldn't.

Q Did you move forward?

A No, sir.

Q Now, sir, you tell us that this trestle, underneath the trestle, was the lowest point in the roadway, is that correct?

A In the access roadway, yes, sir.

Q Sir, when you went under that trestle and at that lowest point in the roadway, was there any water there?

A Only wet.

Q Was there any collection of water there? Was there

a pool of water there?

A Mr. Schultz, there was no pool of water or no collection, sir.

Q Now, sir, with relation to what you do now -- incidentally, how did you get here this time?

A From where, sir?

Q From Florida?

A My wife and I flew up, sir.

Q You flew up?

A Yes, sir.

Q Where are you staying now, sir?

A In Staten Island, sir.

Q Where?

A At the Holiday Inn, sir.

Q Where is that, sir?

A Richmond Avenue right next to the expressway, sir.

Q Now, I believe you told us that you do drive while in Florida, is that correct?

A Yes, sir.

Q And you drive approximately two hours -- I am sorry -- two times a week?

A Approximately, sir.

Q Sir, you are licensed, you have told us, by the State of Florida?

A Yes, sir, I have a Florida operator's license.

Q In addition to driving, what are your other activities?

A What are my other activities. Extremely limited. I think my major activity would be going in the pool, sir. I do some walking, but it's very limited. It's just to loosen me up. Then I come back --

Q So you use the pool?

A Yes, I do, sir.

Q How many days a week do you use this pool?

A When the weather is nice I'll be in there for a couple of hours, two hours, three hours.

Q A day?

A Yes, sir.

Q How many days a week do you use this pool?

A Depending upon the season, five, six days a week.

Q Prior to this accident were you under the care of a doctor for hypertension?

A I had gotten some pills.

Q Sir, could you just answer the question, sir? Were you under the care of a doctor for hypertension prior to this accident?

MR. LASSOFF: May we have a time, your Honor, or is it just at the time of the accident?

THE COURT: I assume immediately prior to the accident.

Q Anytime prior to this accident.

THE COURT: You mean since he was ten years old? That is Mr. Lassoff's objection. If you want a time frame, fix it.

Q Were you under the care of a doctor for a period of two or three years prior to this accident for hypertension?

A Not for the whole period. For a time during this period, yes, sir, I was.

Q Do you remember these questions and answers, sir:

"Q Now, prior to this accident, sir, you had a condition known as hypertension?

"A High blood pressure, yes, sir.

"Q For how long prior to this accident did you have this high blood pressure condition?

"A I think I found out about it two or three years prior to the accident.

"Q Sir, under whose care did you come for this hypertension?

"A I'm not sure. I think I saw a Dr. Rothman at one time. I think I saw a Dr. Spitz for it. I'm not sure, sir."

Do you remember those questions and answers?

A Yes, sir.

MR. LASSOFF: There is nothing inconsistent.

THE COURT: There is nothing different from what the witness has testified to from the stand.

MR. SCHULTZ: I respectfully except, sir.

Q Now, sir, did you have this condition, this hypertension condition or high blood pressure, for a period of two or three years before the accident?

A Yes, sir.

Q And had you been treated by doctors for it before this accident?

A Yes, sir.

Q And had you been advised to lose weight?

A Yes, sir.

Q Did you lose any weight?

A Yes, sir, I did, at the time, Not at this time. In between periods I did.

Q What was your weight two or three years before the accident?

A It fluctuated anywhere between 220 and 255, 260, sir.

Q What did you weigh in January of this year?

A January of this year?

Q Yes.

A Approximately the same I do now, I believe. I couldn't be honest and positive about it, sir.

Q How many cigarettes -- how many packs of cigarettes did you smoke in January?

THE COURT: Of this year?

MR. SCHULTZ: Yes.

A Two.

Q A day.

A Two.

Q Two packs a day, is that right?

A Yes.

Q And how many packs of cigarettes do you smoke a day now?

A Two, sir.

Q I want you to take a look at this picture you took in January of this year, Plaintiff's Exhibit 11, and I ask you, sir, is there a sign indicating the speed behind the lamppost?

A I can't tell.

THE WITNESS: Do you have a magnifying glass, sir?

THE COURT: He says he can't tell from looking at it.

A I can't tell, Mr. Schultz, honestly.

Q Now, these visits that you made -- you made visits

to Dr. Leone, did you not?

A Yes, sir, I did.

Q You have been making visits to Dr. Leone since what, August of '73?

A Yes, sir, that's correct.

Q How far is Dr. Leone's office from your house?

A Approximately 40 minutes, maybe slightly less, but approximately 40 minutes, sir.

Q Do you drive there?

A My wife takes me or my father-in-law takes me or my father will come up.

Q Have you ever driven there?

A No, sir.

MR. LASSOFF: May we have the answer finished before the last question?

THE COURT: Yes.

Q How about Dr. Gervin, how far is he from your house?

A About 25 minutes, 20 minutes away.

Q Do you drive there?

A I believe I have on a couple of occasions, I don't remember. I believe I have.

Q Now, when you drive in and about your home area when you tell us you drive two times a week, three times a week,

for how long do you drive? In other words, what distance in time?

A The fartherest soccer field or baseball field would be about two and a half to three minutes away, sir.

Q Do you leave your car?

A How do you mean, sir?

Q When you get there, do you get out of your car?

A Sometimes I will, sir, and watch the kids practice or play.

Q Now to get back to the scene of the accident, sir, after this accident happened did you get out of your car?

A Yes, sir, I did.

Q And, sir, after you got out of your car did you walk back to the bus?

A Yes, sir, I did.

Q Sir, did you get into the bus?

A Yes, sir, I did.

Q Did you go up the stairs of the bus?

A Yes, sir, I did -- no. Wait a minute now. Wait a minute now. I only went up one step because there was another gentleman ahead of me and then the bus driver and we were all exchanging our licenses. So I went up on the first step.

Q You stood on the step, you say, when you exchanged these licenses?

gw/lf Chiarello-Cross 352

A Yes, sir.

Q Now, sir, there is no question at the time this occurrence took place the roadway was wet?

A You are correct, the roadway was wet, sir.

Q And then you got out of the bus and you walked back to your car?

A Yes, sir, I did.

Q And, sir, you told us on your direct examination, as I recall, on March 3rd, you said that the bus driver came over to ask you if you were all right?

A Yes.

Q And you told us today that you said to him, "I'm shaken and I'm dizzy and I'm scared," do you remember telling us that?

MR. LASSOFF: If your Honor please, there was no such testimony today.

THE COURT: No such testimony today?

MR. SCHULTZ: On March 3rd, your Honor. I'm sorry.

I withdraw the question.

Q Sir, did you tell us -- did you tell this Court and jury on March 3, 1976, did you say to us when the bus driver asked you if you were all right, did you tell us that you told him that you were shaken, dizzy and scared?

A I believe that's correct, sir.

Q And, sir, on January 13, 1976, did you tell us the same thing?

A I don't know, sir. I can't be positive.

Q Do you remember this question and this answer, sir:

"Q Following the accident, what happened?

"A I sat there. I sat there for quite awhile, and what seemed quite awhile anyway. And the bus driver came over to the car and asked me if I was all right. I told him I was shaken. He came over and asked me if I was all right. I told him, I says, 'I'm shaken but I think so.'

"So he said, 'Are you sure?'

"I said, 'Yes.'"

Now, sir, do you remember those questions and answers?

A They are familiar, sir, and if they are in that record then that's what I said, sir.

Q Sir, between the time that you gave those answers to that question and the time you got on the stand here on March 3, 1976, did you talk to your lawyer about what your proposed testimony might be if you were asked what happened or what the bus driver said to you?

A No, sir, I did not.

Q You didn't discuss that with Mr. Lassoff at all?

A No, sir.

Q You didn't discuss it with anybody else?

A No, sir.

Q However, in January did you say anything about being dizzy and scared?

A Sir, if it's not in the record the way you said it then I did not say it.

Q In any event, sir, did you tell him that you were all right?

A If that's what --

Q Did you tell him that, sir?

A I said, "I think I'm all right."

Q And then, sir, you got into your car and I assume you waited for somebody to push you?

A I got into my car. I didn't know what was going to happen next.

Q Did somebody come and push you?

A Yes, sir, they did.

Q And how long was it after you got into your car that somebody came to push you?

A I have no idea, sir.

Q Your best estimate?

A I have no idea, sir.

Q You were pushed to the other side of the bridge?

A Yes, sir, I was.

Q And you called somebody?

A Yes, sir, I did.

Q While you were waiting for somebody to come, what did you do?

A There is a wall by the telephone, a concrete wall. I just sat down on the wall and waited, sir.

Q How long did you wait?

A I figure about 20 minutes, Mr. Schultz. I think that's right, sir.

Q Now, sir, there came a time when you went to one of the --

(Counsel confer)

Q You became an outpatient, did you not, at St. Vincent's Medical Center in Richmond?

MR. LASSOFF: I object to the form of the question, your Honor. I don't know what "became an outpatient" means.

THE COURT: I think --

MR. SCHULTZ: I will withdraw it as long as Mr. Lassoff doesn't know what that means.

Q Sir, did you start going to St. Vincent's Hospital for treatment as an outpatient?

A That's the one in Staten Island, Mr. Schultz?

Q It says Richmond.

A That's the county. I just wanted to be sure. Yes, sir, I did.

Q You didn't go to St. Vincent Hospital in New York, did you?

A No, sir.

Q The only St. Vincent's you went to was in Staten Island, wasn't it?

A I believe so, yes, sir.

Q How far is that from your home?

A 25 minutes. That's not too near.

Q How did you get to there?

A Always, she took me always, my wife.

Q You didn't drive?

A No, sir.

Q Sir, did there come a time when they discontinued that because you didn't attend?

A I don't understand what you mean, sir.

Q Did you stop going there?

A Yes, sir, I did.

Q Did they ever make any new appointments for you?

A Did they ever make any? No, sir.

Q Did you ever look at this record here?

A I have never seen that in my life, as far as I know.

May I look at it and I can tell you for sure?

No, Mr. Schultz, I have never seen this before.

MR. SCHULTZ: May I read at this time, your Honor, to the jury some of this, if I may, your Honor?

THE COURT: If it is pertinent, yes.

MR. SCHULTZ: "Physical therapy progress report. Patient's name Thomas Chiarello. Treatment discontinued due to nonattendance. Last visit September 12, 1972."

Q Mr. Chiarello, how many times in all do you say you went to this St. Vincent's Hospital in Richmond?

A I am not positive. I do have a sheet here that I could look at, if it's all right with you.

Q I can't stop you from doing anything, sir.

A Approximately six times, sir.

Q And, sir, did there come a time when you just didn't go back?

A Yes, sir, there did.

Q You tell us each time you went back there your wife drove you?

A Yes, sir, that's what I said.

Q Now, sir, in addition to swimming and driving in and about Florida at the present time and being in your pool, what else do you do? And occasionally walking, as you tell us.

A Sit and watch the kids in their sports activities, get up and walk around. Not much else, Mr. Schultz.

MR. SCHULTZ: Excuse me a minute, your Honor.

(Pause)

Q Incidentally, Mr. Chiarello, did your wife work for a doctor?

A When, sir?

Q You tell me. Did she ever work for a doctor?

A She has, yes.

Q What doctor?

A Dr. Kramer in Florida.

Q In Florida?

A Yes, sir.

Q When was that?

A I don't know. I can't give you dates. Last year, I believe it was.

Q Now, you have told us that you had difficulty with your sexual relations, is that correct, sir?

A Yes, sir, that's correct.

Q How many times do you have sexual relationship with your wife now on an average?

A May I ask the definition of sexual relations?

Q How many times do you have sexual relationship with your wife now?

A As many times as I possibly can.

Q How often would that be?

A I have no idea, Mr. Schultz.

Q Would it be more than --

A Once every two weeks. I do not know, Mr. Schultz. Whenever I am physically able to try the act. I have tried the act. I cannot complete it.

MR. SCHULTZ: Move to strike it.

THE COURT: He had difficulty with the words you used. So he is describing for you what happens.

Q Mr. Chiarello, did you also testify and did your wife testify in March of 1974?

THE COURT: You can ask him about what he testified, not what the wife testified.

MR. SCHULTZ: May I explore it? If the answer to this next question is no --

THE COURT: I am sorry. I will not let you read that to this witness. You can ask him what he testified to.

MR. SCHULTZ: Perhaps he was present when it occurred.

THE COURT: I am not interested in that.

MR. SCHULTZ: If your Honor please --

THE COURT: There are other ways of doing it, Mr. Schultz, not this one.

MR. SCHULTZ: If he was present when she testified --

THE COURT: Mr. Schultz, I have ruled.

MR. SCHULTZ: I respectfully except, your Honor.

Q I would like to ask you, sir, can you tell us how many times you have had sexual or attempted sexual relationships --

THE COURT: You have to break that down. The witness tried to explain it.

MR. SCHULTZ: I am not bound by that.

THE COURT: He has asked you for a definition. You are not giving it to him. I am now telling you you cannot lump the two together.

MR. SCHULTZ: I respectfully except.

Q How many times have you had sexual relationship with your wife on an average since this accident?

THE COURT: By that I assume you mean completed sexual relations.

MR. SCHULTZ: Judge, may I respectfully except to your Honor, please.

THE COURT: You can except. I am asking you to clarify your question. It is obvious from the witness' answer to your prior question he draws a distinction and you are unwilling to tell him. I can only ask you to define it.

MR. SCHULTZ: It is not that. I am trying to seek the truth.

THE COURT: So am I, more so than you are.

MR. SCHULTZ: I respectfully except, your Honor.

THE COURT: Now put the question the way I told you to put it or I will put it. Which way do you want it, Mr. Schultz?

MR. SCHULTZ: I would prefer you to put it, if your Honor please.

THE COURT: How many times have you had completed sexual relations with your wife in the last two years?

THE WITNESS: None, sir.

MR. SCHULTZ: I respectfully except, your Honor.

THE COURT: None, he said.

THE WITNESS: None.

Q Were you present when your wife was examined before trial in March of 1974?

A I was in the courtroom, sir, yes -- wait a minute.

Q March, of '74.

A That is the pretrial examination?

Q Yes.

A Yes, sir, I was.

Q Did you hear your wife testify?

A Yes, sir.

gw/lf Chiarello-Cross 362

Q When did you discuss -- withdrawn.

Did you discuss with anybody the speed limit that you claim existed there before you took the stand this morning today and on March 3rd?

A Did I discuss the speed limit.

THE COURT: You mean the existence of a sign telling the speed limit?

MR. SCHULTZ: Yes, your Honor.

A Yes, I did, sir.

Q Who did you discuss it with?

A With my attorney.

Q When did you do that?

A I think it was back in '74, before the pretrial or before last January. I don't know which one, sir. I don't know which one, sir, when.

Q Was it between January and now?

A No.

Q Did you go back and look at the scene?

A Did I go back and look at the scene when, sir?

Q In January, when you took these pictures.

A Yes, sir, I was there. I took those.

Q Did you look at the sign then?

A Yes, sir, I believe I did, sir.

MR. SCHULTZ: No further questions.

gw/lf Chiarello-Redirect 363

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. LASSOFF:

Q Mr. Chiarello, you have testified to taking various medications. Did you keep receipts for some of the medications you purchased?

A Yes, sir, I did.

Q Are these some of the receipts that you kept from drug stores both in Richmond and in Florida?

A These are them.

Q Those are the receipts for medicines you purchased for yourself?

A Yes, sir.

MR. LASSOFF: I offer them in evidence, your Honor.

MR. SCHULTZ: Objection.

THE COURT: Show it to them.

MR. LASSOFF: I showed it to him already.

THE COURT: It doesn't mean anything.

MR. LASSOFF: He doesn't want to look at them.

THE COURT: What is your objection?

MR. SCHULTZ: There is no foundation. Secondly, I don't know whether this is necessarily for the treatment of this occurrence. There is no medical testimony that there was. I don't know, sir. I respectfully object.

THE COURT: I will sustain the objection.

Q Mr. Chiarello, you stopped going to the Richmond Memorial Hospital in Richmond, Staten Island, on September 12, 1972. Did you see Dr. Spitz on September 13, 1972?

A May I refer, sir?

THE COURT: Yes.

A May I have that date in September?

Q 13th.

A Yes, sir, I did.

Q And did you see Dr. Spitz on September 20, 1972, or 21st?

A On the 20th, sir.

Q At the time you were seeing Dr. Spitz at that time, were you also seeing Dr. Urs?

A Yes, sir, that's correct.

Q And can you tell us for how long a period of time you continued to see Dr. Urs, when you started and when you stopped?

A Yes, sir. Dr. Urs I saw for the first time on July 13th of 1972. I stopped seeing him in November of that year.

THE COURT: How many times did you see him between July 13th and November?

THE WITNESS: Give me one second and I will count them for you.

MR. SCHULTZ: If I may, your Honor, what doctor is that?

THE COURT: Urs, U-r-s.

MR. SCHULZ: I respectfully except, your Honor.

THE COURT: Overruled.

THE WITNESS: I have down here eight visits, sir.

Q Eight visits?

A Yes, sir.

Q Was it Dr. Urs who sent you to the Richmond Memorial Hospital for physiotherapy?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Who sent you to the Richmond Memorial Hospital?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Dr. Urs.

Q Did somebody send you to another hospital at or about the same time for physiotherapy?

A Dr. Urs did.

Q To another hospital?

A To another hospital, yes, sir.

Q What other hospital?

A St. Vincent's, sir, St. Vincent's Medical Center.

Q I said Richmond Memorial. Excuse me.

THE COURT: When did Dr. Urs send you to Richmond Memorial Hospital?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A He sent me on the 14th of July, sir. He sent me again -- no, just on the 14th of July. I also went on November 2nd, 9th, 14th and 16th, sir, to Richmond Memorial, sir.

THE COURT: All right.

MR. LASSOFF: No further questions, your Honor.

MR. SCHULTZ: At this time, your Honor, may I look at the paper the witness is using, please?

THE COURT: Yes.

THE WITNESS: It's on both sides, sir.

(Handing)

RECROSS EXAMINATION

BY MR. SCHULTZ:

Q Did you prepare this, sir?

A Most of the writing on there is my wife's. It is just to refresh my memory, sir.

MR. SCHULTZ: No questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: Next witness.

MR. LASSOFF: May I find the gentleman?

THE COURT: Yes.

J O S E P H E D W A R D D E V O Y, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. LASSOFF:

THE COURT: You are still under oath, Mr. DeVoy.

Q Did you obtain the base salaries for Mr. Chiarello and the other man when you went out in the hall to the telephone?

A Yes.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes, I did.

Q And in 1972, what were their base salaries?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHULTZ: If your Honor please --

THE COURT: You have a continuing objection to this testimony.

MR. SCHULTZ: If your Honor please, may I press the objection for the record, if I may, the reason?

THE COURT: You may do it up here at the side bar.

(At the side bar)

MR. SCHULTZ: If your Honor please, this other man is nameless. I have no way of checking the veracity.

THE COURT: I will tell him to bring the fellow in, if you want me to. All we are trying to do is get the base salary and what the increases were from that time to this. If you think this witness is telling an untruth we will get the other man.

MR. SCHULTZ: I don't know.

THE COURT: You have been around a long time, Mr. Schultz. You know whether a man who has no interest in this is going to lie or not. He is inspecting the records of the union.

MR. SCHULTZ: He is not the union.

MR. LASSOFF: Of Universal.

THE COURT: Of Universal.

MR. SCHULTZ: I also object as to incompetency, too, Judge.

THE COURT: It comes in on the basis of what increases were granted to people holding this job since 1972 to date.

MR. SCHULTZ: There is no proof this man would have been able to stay on. He may not have been employed.

THE COURT: That comes in all the time. You can argue that to the jury, but you always show what a man would have earned if he hadn't been injured.

MR. SCHULTZ: The point is this, that all the rest of his family were let go. He may have been let go, too.

THE COURT: Within one year he said the agreement was they were to be let go. He was kept on for four more years. The rest were let go. Any injury case a man testifies as to what he would have earned if he hadn't been hurt. The way you do this is by the records of the company or the union.

MR. SCHULTZ: Not the progressive stuff. He testifies what they earned, but not in the future.

THE COURT: Wait a second. From the time he was employed and hurt until the time of the trial we take testimony every day in the week of what the union contract shows was the increase in salary for stevedores. The assumption is if he hadn't been hurt he would have continued to work. You can argue the contrary to the jury if you wish.

Do you want to take this or tell him to bring the man in?

MR. SCHULTZ: Sir?

THE COURT: All he is testifying to is what the base pay was there and what a person similarly situated would be earning today in the same job.

MR. SCHULTZ: I will object to it but I won't require him to bring him in.

THE COURT: Overruled.

(In open court)

THE COURT: Within one year he said the agreement was they were to be let go. He was kept on for four more years. The rest were let go. Any injury case a man testifies as to what he would have earned if he hadn't been hurt. The way you do this is by the records of the company or the union.

MR. SCHULTZ: Not the progressive stuff. He testifies what they earned, but not in the future.

THE COURT: Wait a second. From the time he was employed and hurt until the time of the trial we take testimony every day in the week of what the union contract shows was the increase in salary for stevedores. The assumption is if he hadn't been hurt he would have continued to work. You can argue the contrary to the jury if you wish.

Do you want to take this or tell him to bring the man in?

MR. SCHULTZ: Sir?

THE COURT: All he is testifying to is what the base pay was there and what a person similarly situated would be earning today in the same job.

MR. SCHULTZ: I will object to it but I won't require him to bring him in.

THE COURT: Overruled.

(In open court)

THE COURT: What was the base pay in 1972?

THE WITNESS: $15,999.92.

BY MR. LASSOFF:

Q Can you tell us what the base pay went up to in 1973?

MR. SCHULTZ: Objection.

THE COURT: That is the exact figure on his withholding statement for 1972 or 1971?

MR. LASSOFF: 1971.

THE COURT: We had to go through all this telephone calling to find the same figure?

MR. LASSOFF: I didn't know.

THE COURT: It's in evidence before the jury. What's the base pay today in 1976?

MR. SCHULTZ: Objection.

THE WITNESS: I don't have the base pay for '76, your Honor. I have it for '75.

MR. SCHULTZ: Objection.

THE WITNESS: $19,499.92.

THE COURT: That finishes you. Thank you very much, Mr. DeVoy.

Is there any cross examination?

MR. LASSOFF: Can we show '73 and '74? We only have '72 and '76.

THE COURT: I won't take it for the future.

MR. LASSOFF: I don't want it for the future. I want to show for the purpose of my economist, I have to have some figures.

THE COURT: He is only going to give me what he thinks will happen in the future.

MR. LASSOFF: All right, sir.

THE COURT: Thank you very much.

(Witness excused)

MR. LASSOFF: Your Honor, may I ask for a recess at this time since the economist has worked on the other things and he has to adjust them. Five or ten minutes.

THE COURT: We will have a short recess.

(Recess)

THE COURT: Next witness.

MR. LASSOFF: Dr. Seplaki, would you take the stand, please.

L E S S E P L A K I, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Seplaki, what is your profession?

A I am associate professor of economics. I teach

economics at the university.

Q Would you tell us your educational background and qualifications, please?

A Yes. I have a Bachelor's Degree in economics from Sir George Williams University, Master's Degree in economics from McGill University.

Q Are both those universities in Canada?

A They are both universities in Canada, right. I have a Ph.D., Doctor of Economics from the University of California. I did one year of post-doctoral work in economics at the University of Chicago and starting this fall I was awarded a visting scholarship at the Harvard Law School.

Q Doctor, would you tell us what the field of economics encompasses as far as your background?

A Essentially in very broad terms, it deals with production and distribution processes of scarce goods and services. Scarcity meaning here the relative scarcity, that is, scarce to the satisfaction of human wants. Economics deals with all goods and services that must command a price which must be rationed out because of their scarcity.

Q Is part of the field of economics words such as inflation and deflation?

A Absolutely.

Q Would you explain to the jury what inflation is?

MR. SCHULTZ: Objection.

THE COURT: I would think that all of us know what inflation is.

MR. LASSOFF: Maybe I should get more specific.

Q Would you explain what inflation is with regard to the cost of living?

MR. SCHULTZ: Objection, your Honor.

THE COURT: It goes up. Next question.

Q Sir, was it part of your work in economics during your studies and during your work to figure out the annual rate of inflation in this country over the last ten, fifteen years?

A Yes, sir.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

THE COURT: You want a continuing objection to the witness' testimony?

MR. SCHULTZ: No, sir, I don't. I won't object as they go along. Some of it may be relevant. I don't know.

THE COURT: All right.

Q Can you tell us, did you make calculations for the years 1975 and 1974 with regard to inflation in the United States?

gw/lf Seplaki-Direct 374

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, I have.

Q Can you tell me what factors went into your calculations with regard to your figures in 1975 for inflation?

MR. SCHULTZ: Objection.

THE COURT: Sustained. He can give his conclusion without giving his underlying reasons.

Q Can you give us the rate of inflation in the United States in the year 1975?

A During the year 1975 the rate of inflation was 12.9 percent.

Q Can you give us the figures for the rate of inflation in the United States for the year 1974?

A 13.9 percent.

Q '73?

A 7.8 percent.

Q '72?

A Four percent.

Q '71?

THE COURT: That's enough. That takes us back to the date of the happening of the accident.

Q You were giving us figures in percentages. Can you give us those figures with regard to the value of the dollar

in 1972 as contrasted to the value of the dollar at the present time?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Do the figures you have cited to us indicate that the cost of living has gone up each of the years since 1972?

A Yes.

Q At my request did you make certain calculations with regard to Mr. Chiarello's future loss of earnings?

A Yes, sir, I have.

Q Assuming a work expectancy of age 65 and assuming also that Mr. Chiarello has testified he is 39 years old today, without inflation what would be his loss of earnings?

MR. SCHULTZ: Objection.

THE COURT: Overruled. That is based on the assumption he continues to work at the present base pay of $19,500.

A Without inflation you would like the present value?

Q Yes.

A I will have to figure it out. I had incorporated inflation as that is a standard procedure.

Q Tell us with inflation.

MR. SCHULTZ: Objection.

THE COURT: We don't know how you calculate inflation

for the next 26 years.

THE WITNESS: It is possible, your Honor, to project it at a conservative rate of six percent.

Q Can you project inflation in the United States for the next 26 years?

A Yes, sir.

MR. SCHULTZ: Objection, if your Honor please. Speculative.

THE COURT: Mr. Schultz says it is speculative. You had better ask the witness how it is done.

Q How do you do that?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Projection of inflation is essentially based on past inflation data and given the fact that inflation has been with us as long as economic studies have been made and economic transactions have been observed over the past 200 years or more, it has been observed that inflation has always been with us. In fact, this is the oldest and most established economical malady that we know. The projection of inflation is based on data from past inflation rates and the projection that I have arrived at is calculated in that manner.

Q What projection have you arrived at?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Six percent annually.

Q Six percent annually?

A Yes.

Q Over the next 26 years?

A Yes.

Q Would you make your calculation first of all as to the value of Mr. Chiarello's future loss of earnings without inflation?

A If I can do that.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: I don't know what he is going to do. Is he going to multiply 26 --

THE WITNESS: Calculate the present value of annuities.

THE COURT: That is the jury's function.

Q All we want is the gross amount, 195 by 26.

A The amount of that, sir, is 570,000.

MR. SCHULTZ: I object, first.

THE COURT: You are multiplying 26 times nineteen thousand five?

MR. SCHULTZ: Yes.

THE COURT: Overruled.

A $570,000.

Q If you add to your figures, sir, the figures for an annual rate of six percent inflation per year for the next 26 years, what would you calculate the real value of Mr. Chiarello's loss of earnings to be?

MR. SCHULTZ: May I respectfully --

THE COURT: I don't know if you mean the real value. That is going backwards.

MR. LASSOFF: I will take out the word "real."

MR. SCHULTZ: May I respectfully object first of all on the basis of 26 years. The plaintiff is a man of 39 years of age, hypertension, smokes two or three packs of cigarettes --

THE COURT: Wait a second. That's up to the jury. I don't want a summation now. The jury may use the ordinary rates and they can vary them as they see fit. I will let this testimony in on this basis. Objection overruled.

Q If you add inflation of six percent a year for the next 26 years to the present value of Mr. Chiarello's money, what, if anything, do you come out with?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Applying a six percent annual inflation rate as well as a six percent discount rate of the present value --

THE COURT: I don't want that. You cannot tell us that. I told you that twice now.

A Just applying the inflation rate, the estimated total earnings of Mr. Chiarello would be about $900,000.

MR. SCHULTZ: Objection, your Honor.

THE COURT: All right. Overruled. Two figures I want to put to you. I want to put the figure of five and a half percent and I want to put a figure of seven and a half percent discount value.

THE WITNESS: I would have to estimate it, your Honor, because I do step by step. Every year has to be discounted. It would take quite a bit of time. I could estimate it.

THE COURT: Take the gross figure and what is its present value?

THE WITNESS: At five and a half percent, your Honor, it would be approximately 615,000.

THE COURT: At seven and a half percent?

THE WITNESS: It would be approximately 450,000, your Honor.

MR. LASSOFF: No further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q How old are you, Dr. Seplaki?

A 38.

Q Have you ever worked in private industry?

A I have.

Q Have you ever worked as a economist in private industry?

A I have.

Q Where?

A At the Bell Telephone Company in Canada.

Q You and I aren't strangers, are we?

A Only by virtue of the fact --

THE COURT: Wait. What difference does it make whether you are strangers?

Q Have I questioned you before?

A Yes, you have.

Q Sir, have you testified for plaintiff's attorneys in the past?

A Yes, I have.

Q Sir, did you ever tell us in the past that you had been employed in private industry when asked?

A If I was asked, I would have told you. It was ten, fifteen years ago.

Q Did you ever hear of the years 1930 to 1938?

A Have I ever heard of the years? Yes, I have.

Q Do you know those years, 1930 to 1938?

A I do, yes.

Q Was that a depression era?

A It included a period of depression, yes.

Q Sir, during that period of time did the cost of living decrease from 1929?

A During that period of time and only during that period of time in the whole interest of the economy.

Q Did it decrease?

A During that period of time alone it did.

Q Sir, in the history of this country from an economic standpoint, have there not been depressions, boom, depressions?

A On an escalated scale.

Q Have there been areas of depression? Was there not a depression even after World War II?

A There have been recessions, not depressions.

Q Recessions. And there was a full-scale depression from 1930 to 1938, was there not?

A Yes, sir, there has been. Consumer price index excludes that.

MR. SCHULTZ: I move to strike that.

THE COURT: I strike that.

Q Now, sir, there is such a thing today as treasury

certificates, are there not?

A Yes, there are.

Q And certificates of deposit?

A Correct.

Q How much would have to be invested in certificates of deposit, sir -- first of all, do you know that there are certificates of deposit that yield seven and a half to eight to nine percent?

A Very short term ones.

Q Do you know that there are those things?

A Yes.

Q And that some of them are for six year terms, do you know that?

A I would think that that's a little too long.

Q Do you know, sir, if you invest over a hundred thousand dollars at a time you can negotiate interest rates for certificates of deposit?

A Not with the government you cannot.

Q With banks?

A For certain deposit certificates, yes, you can.

Q Over a hundred thousand dollars, you know that?

A Yes, you can, sure.

Q Sir, do you know that some of these banks, the certificates of deposit, depending on the length of time,

pay as much as seven and a half to eight and a half percent?

A That depends on the bank.

Q Do you know that?

A There is a possibility for negotiations as far as interest rate is concerned. I don't think the margin is too large, though.

Q Would you agree it's between seven and a half and eight and a half percent?

A For what term, sir?

Q For six years, ten years.

A I think that would be somewhat too high.

Q How about five years?

A Make it a little shorter than that.

Q How much would you have to invest at, say --

THE COURT: Let's tie it down.

MR. SCHULTZ: I want to ask him another question.

THE COURT: I want to ask him another question.

MR. SCHULTZ: You run the parade.

THE COURT: I walk by banks and I see signs out, "Certificate of Deposit, Two Years in Savings Banks." What rate of interest do they pay?

THE WITNESS: For a two-year period I would think, sir, somewhere in the neighborhood of six, six and a half, this all depends on the amount, your Honor.

THE COURT: I go into a savings bank and I see a sign: "Leave Your Money Here for Two Years." I think the figure is seven and a half percent when I have walked by savings banks.

MR. LASSOFF: The doctor's problem is those are not called certificates of deposit.

MR. SCHULTZ: Objection, your Honor.

THE COURT: That may be. I go into a savings bank pursuant to the sign I see in the window and I give them a lot of money and they say if I leave it there for two years or I give them 5 -- maybe it is a thousand dollars -- I don't know what the minimum is, but they put a sign in the window if I give them more than a thousand dollars they will give me seven and a half percent, won't they, a year?

THE WITNESS: It's possible, sir.

Q Since you graduated from that school in Canada, McGill, have you ever worked in private industry?

A I have been entirely an academia.

Q You have been in the academic world, right?

A Yes, consultant to private industry.

Q You haven't worked in private industry?

A I have done consulting to private industry.

Q You have been --

THE COURT: He says he consulted for private industry. I assume that is getting paid for his work.

Q Sir, did you ever work full time in private industry since you got out of school?

A Which school, sir? Which university?

Q McGill.

A McGill University. No, I have not. Not full time.

Q When did you get out?

A From McGill?

Q Yes.

A '66.

Q So for ten years you have been in the world of academia?

A In the world of economics.

Q In the academic level?

A As an economist I function in academia, yes.

Q Now tell me, at seven and a half percent how much would you have to invest to yield $19,500?

A During what period of time?

Q How much would you have to invest over a year to yield 19,500, what lump sum?

A At the end of the year you want $19,000, you are asking how much would you have to invest at the beginning of the year?

Q Right.

MR. LASSOFF: I assume you mean interest.

MR. SCHULTZ: Yes.

MR. LASSOFF: In interest.

A 18,300.

Q How much?

A 18,300. The question was how much do you have to --

MR. LASSOFF: Your Honor, the answer is obviously impossible.

THE COURT: It doesn't yield 19,000 in interest. Is that your question?

MR. SCHULTZ: Sir, I put the question and I got the answer. He is an economist.

THE COURT: I am sorry. Obviously either he misunderstood the question or the Court misunderstood the question. I understood the question to mean how much money do you have to deposit to yield $19,500 in interest. Now, if I am wrong, correct me.

MR. SCHULTZ: I asked him.

THE COURT: In interest?

MR. SCHULTZ: Yes.

THE COURT: Obviously 18,000 is a wrong answer.

A I understood the question to be how much do I have to deposit at the beginning of the year in order to yield

principal at the end of the year 19,500.

THE COURT: The question is how much do you deposit at the beginning of the year that will yield you 19,500 in interest.

THE WITNESS: During what period of time, sir?

THE COURT: One year.

A Approximately $150,000.

Q $150,000?

A Yes.

THE COURT: To yield $19,500?

THE WITNESS: At the end of one year.

THE COURT: At seven and a half percent?

A About $180,000, sir.

MR. LASSOFF: Impossible.

Q Now, sir, you told us, I believe, that your primary concern was involving scarce goods and services, is that correct?

A That is the primary concern of economics as a very broad social science.

Q Is that your concern?

A My specialization?

Q Yes.

A No.

Q What is it?

A I specialize in areas of economics pertaining to the firm, pertaining to individuals and antitrust.

Q Now, would you tell me, sir, between 1930 and 1937 what was the annual rate of deflation, if you know, as an economist in the world of academia?

A I would have to look up data I don't have handy.

Q Do you know that?

A I don't and neither does it enter into the picture here.

Q But you don't know it?

A No, not offhand.

Q Has this country been in a recession for the last two years?

A You could say that, yes, there has been a recession.

THE COURT: That doesn't mean there wasn't any inflation.

THE WITNESS: That's right.

MR. SCHULTZ: Thank you, your Honor.

Q Has the value, sir, of real property in certain areas in this country gone down in the last two years?

A I am sure it has in certain areas.

Q So the acquisition of certain property would cost less today than it did two years ago, isn't that true?

A In those certain areas, I presume so.

MR. SCHULTZ: I have no further questions now.

REDIRECT EXAMINATION

BU MR. LASSOFF:

Q Dr. Seplaki, I don't mean to quarrel with your figures but I took the figure --

MR. SCHULTZ: May I respectfully object. This is his own witness. He wants to impeach him now.

THE COURT: Why not?

MR. SCHULTZ: Why should he?

THE COURT: The rules in this court adopted six months ago say you can.

MR. SCHULTZ: I respectfully except.

Q I take $150,000 and to me ten percent a year of $150,000 is $15,000.

MR. SCHULTZ: I object. This is not a proper question. He is arguing with the witness.

THE COURT: Overruled.

A I haven't said anything yet.

THE COURT: What he is saying -- maybe you had better get that little calculator of yours out again.

The question that you answered on cross examination obviously is wrong. It is the amount of money that you must invest on March 5, 1976, to give you $19,500 worth of interest March 5, 1977. That's the question that was put to you.

THE WITNESS: I understand the question. At seven and a half percent?

THE COURT: At seven and a half percent.

THE WITNESS: $195,000 would yield at ten percent 19,000.

Q We are talking about seven and a half percent.

THE COURT: May I respectfully suggest the answer is $260,000.

THE WITNESS: Yes.

MR. LASSOFF: Thank you, your Honor. I agree.

No further questions.

THE COURT: You may step down.

MR. LASSOFF: Your Honor, one second.

BY MR. LASSOFF:

Q Would you calculate at five and a half percent --

THE COURT: I don't think we need the witness.

MR. LASSOFF: All right.

(Witness excused)

THE COURT: Next witness.

MR. LASSOFF: Mrs. Chiarello.

She will be back in a minute. I can read the deposition.

THE COURT: You may.

MR. LASSOF: I am now reading from a deposition or

examination before trial of Henry Girdwood spelled here G-i-r-w-o-o-d, but actually G-i-r-d-w-o-o-d.

MR. SCHULTZ: Could you hold one second, sir, while I try to locate it. I didn't know you were going to read that.

MR. LASSOFF: Do you want me to find you a copy, Mr. Schultz?

MR. SCHULTZ: No, I don't need yours. I will find mine.

MR. LASSOFF: "One of the defendants herein taken by the plaintiff pursuant to notice dated March 21, 1974, held at Federal Court, New York, New York, on April 11, 1974, at 2:00 p.m.

"Henry Girdwood, one of the defendants herein, having been duly sworn by a notary public of the State of New York, was examined and testified as follows:

"Examination by Mr. Lassoff.

"Q What is your name and address?

"A Henry Girdwood, 268 Davis Avenue, Carney, New Jersey.

"Q Mr. Girdwood, by whom are you presently employed?

"A By Domenico Bus Services.

"Q In what capacity are you presently employed

"by Domenico Bus Services at the present time?

"A A a bus driver.

"Q On June 30, 1972, were you employed by Domenico Bus Services in that capacity?

"A Yes, sir.

"Q About six to 6:30 on that day was the busyou were driving involved in an accident?

"A Yes, it was.

"Q Where did that accident take place?

"A On the approach ramp to the Bayonne Bridge in Staten Island.

"Q Do you know the number of the bus you were drivin on that day?

"A I do know the number but I don't have it with me.

"Q What time did you start working on June 30, 1972?

'A Six o'clock in the morning.

"Q And what time did you stop working that day?

"A I was finished at nine o'clock in the morning and then I went back to work for afternoon for the commuter run.

"Q In other words, this is basically a commuter

"bus company and you worked mornings and evenings?

"A Yes, sir.

"Q Where did this trip, I take it starting some place in New Jersey, where did this trip end, some place in New York?

"A Going from the Port Authority Bus Terminal in New York City through Lincoln Tunnel, through Hoboken, across the New Jersey Turnpike Extension into Bayonne, along Hudson Boulevard, then Bayonne and over the Bayonne Bridge to Staten Island and then Staten Island to Forest Avenue and Clove Road and Highland Boulevard.

"Q I take it that at the time this accident occurred you were going over the Bayonne Bridge into Staten Island?

"A Yes, sir.

"Q Do you have any idea how many passengers you had in the bus?

"A Yes, I had a full bus load, 51 persons.

"Q Any of your passengers standing?

"A They were all seated.

"Q Was anybody else in the employ of Domenico Bus Company in the bus when this accident occurred?

"A No, there was not.

"Q Can you tell us the manufacturer of this bus

"and the year of this bus?

"A It is GM Coach but I am not sure of the year because it's model is the same year after year but I would venture around 1965.

"Q How wide is that bus and how long?

"A About eight feet wide by 38 feet long.

"Q Where you sit in the bus, is that on a raised platform or above or below the level where the passengers sit?

"A It's on the floor level, which is one inch below the raised seats of the bus.

"Q Can you tell us with reference to the front window of this bus how high from the floor level does this commence and how much distance is there to where the window ceases, in other words, how wide is this window?

"A The window is a full eight feet wide.

"Q And it's covered?

"A Yes, sir.

"Q And how tall or high is the structure?

"A Four and a half feet.

"Q Now, in connection with the bus, when you open the bus to see traffic in front of you, do you look through this bus window or do you have any mirror or devices to see traffic in front of you?

"A No, directly through the windshield.

"Q In connection with traffic alongside or behind you, are there mirrors, and, if so, what mirrors are there?

"A There are two outside mirrors which are convex mirrors which are mainly to look out and see out almost directly to my side, both sides.

"Q Just before this accident occurred, was there any vehicles either to the right or left side of your bus?

"A Yes, sir.

"Q Which side was the vehicle?

"A The left side.

"Q Was that going in the same direction you were going or the opposite direction?

"A The same direction.

"Q Now, when this accident occurred were you on the ramp leading to the Bayonne Bridge?

"A I was.

"Q At the point where the accident occurred, how wide was the ramp?

"A About 25 feet.

"Q Is that 25 feet wide in the direction you were going?

"A Yes, sir.

"Q Where was this car that was alongside you with reference to the front of your bus?

"A To the left rear.

"Q How far?

"A At just about my engine.

"Q Your engine is in the front of the bus or the back?

"A The rear of the bus.

"Q Now, had you passed this car that you say was at the left rear of your bus at any time before this accident occurred?

"A No, he had caught up with me.

"Q He had caught up with you?

"A Yes, sir.

"Q Now, at the time of the accident what were the weather conditions?

"A Wet.

"Q Was it raining?

"A It had just stopped raining.

"Q About how long before the accident had it stopped raining?

"A I had ridden through it, about three or four minutes, I had ridden through it.

"Q Tell us how you got on the ramp leading to the Bayonne Bridge.

"A Well, along Hudson Boulevard and beyond is an intersection in the right lane and down the ramp and down the incline.

"Q You have to make a turn to get onto this ramp?

"A Yes, from the boulevard it is about a 60 degree angle.

"Q Excuse me and let me rephrase that.

"Taking a right angle I came this way and went 60 degrees off that. So actually I did not make much of a turn.

"Q Will you describe the ramp from the point you entered the ramp to the point where the accident occurred?

"A I didn't hear you.

"Q The ramp, what does it look like from the point you got on the ramp to where the accident occurred?

"A A downgrade and a puddle at the bottom of the downgrade where there was a sewer and the sewer was obviously clogged.

"Q Did the accident occur before you reached this puddle?

"A No, after the puddle.

"Q So you had gone through the puddle before the accident occurred?

"A Yes, sir.

"Q At the point where the puddle was was there a dip in the road?

"A The puddle was in the dip.

"Q How far had you gone beyond that dip when the accident occurred?

"A Approximately 25 feet.

"Q When you entered the dip in the road, could you still see traffic in front of you, in front of the bus?

"A Yes, sir.

"Q Before you entered the dip in the road how far was the nearest car in front of you to the bus?

"A 75 feet.

"Q Was the car that your bus eventually came in contact with the car you say was 75 feet in front of you before you entered the dip?

"A Yes, sir.

"Q When you say the car was 75 feet in front of you, was there only one lane of traffic at that time or was there more than one?

"A There was only one. There were two lanes but they were only using one.

"Q Would that be because it had recently stopped raining and the outer lane and inner lane of the road had lots of water on it?

"A Yes, sir.

"Q When did you first notice the car in front of you start slowing or stopping, if you noticed that?

"A About 50 feet in front of me when I seen the car ahead of him apply his lights first.

"Q So you could see the car in front of the car you eventually came in contact with apply his brakes?

"A Yes.

"Q Did you see the car directly in front of you apply his brakes as well?

"A Yes, sir.

"Q How far did the car in front of you travel from the time you first saw him apply his brakes until the time the accident occurred?

"A 25 feet.

"Q At the time the accident occurred, was either the vehicle, the second car in front of you, or the one you came in contact with moving?

"A No, he was stopped.

"Q How lon had they been stopped before the bus came in contact with Mr. Chiarello's car?

"A Just a matter of a second.

"Q How fast were you moving before you saw the other cars apply their brakes, apply their brake lights?

"A About 25 miles an hour.

"Q When you saw the other two cars apply their brake lights, what did you do?

"A I applied mine, not with full pressure, because I had gone through the water.

"Q In front of you were the two cars you have described, the car your bus came in contact with and the car in front of you that came to a stop. Did you see another vehicle going through the puddle?

"A Yes, sir.

"Q Were these cars stopped while this other vehicle went through a puddle?

"A They had slowed down to let the vehicle go through. This gentleman had completely stopped and the car in front had completely stopped also or had started to move up again.

"Q At any time before the accident occurred, did you attempt to change lanes or to change direction of your bus in any way?

"A Yes, I did not change lanes but I did look at my mirror to see if I could get over past him on the

gw/lf Girdwood 401

"left when I was starting to apply my brakes and I seen the slippery condition and I seen my mirror and the guy was still hugging my left rear wheel.

"Q So at no point from the time you first saw the car in front of you apply their brakes did you change lanes?

"A No, sir.

"Q What part of your bus was in contact with Mr. Chiarello's car?

"A The front bumper.

"Q Where did you strike Mr. Chiarello's car?

"A On the rear.

"Q Straight on from the front to the rear?

"A Yes, straight.

"Q At the point where this accident occurred, what speed were you proceeding?

"A My wheels were completely locked at the speed of 20 miles an hour.

"Q What distance does it take you to stop your bus completely?"

MR. SCHULTZ: Objection, your Honor. There was an objection at the time, too.

MR. LASSOFF: It was answered, your Honor, if you have a copy.

THE COURT: Because it was answered doesn't mean you can read it.

MR. LASSOFF: May I give your Honor a copy?

THE COURT: Page?

MR. LASSOFF: Page 14, line 8, is the question. That question was not answered. May we go to line 14?

"Q For whatever" --

THE COURT: Wait. I will let you answer the question starting at 14.

MR. SCHULTZ: Your Honor, may I respectfully object.

THE COURT: Overruled.

MR. LASSOFF:

"Q For whatever it's worth, if you can answer that question, please do.

"A I couldn't do it to be exact for I'm not expert, but at 20 miles an hour, however, I think I can stop that bus in 30 feet in dry conditions.

"Q You have driven that bus in rainy conditions, have you not?

"A Yes, sir.

"Q And you have driven on that same ramp of the Bayonne Bridge in rainy conditions?

"A Yes, sir.

"Q How fast under rainy conditions could you stop your bus under conditions that prevailed at the time and place of the accident?"

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. LASSOFF:

"A It would take about 50 feet, roughly.

"Q At the time this accident occurred, did your bus push Mr. Chiarello's car into the car in front of him?

"A Yes, it did.

"Q And how much distance was there at the point of the impact between Mr. Chiarello's car and the car in front of him that you said had started moving again?

"A About ten feet.

"Q Did you get out of your bus after this accident?

"A Yes, sir, I did.

"Q Did you go to Mr. Chiarello to ascertain whether he had been injured?

"A Yes, sir.

"Q Did you also go talk to the car in front of Mr. Chiarello?

"A No. At that time that driver was already

"out of his vehicle and was walking back.

"Q Did you observe what damage there was to the front of the car of Mr. Chiarello?

"A No, I did not.

"Q Did you observe what damage there was to Mr. Chiarello's car?

"A Yes, sir.

"Q What damage did you see?

"A His front radiator was leaking and the back of his car was dented and the bumper pushed in and the taillight was broken.

"Q How about the inside of his car, did you notice anything about the seats and particularly the one he was sitting on?

"A No, sir.

"Q Did you notice the seat had ripped loose and had completely stripped from the mechanism?

"A No, I did not because Mr. Chiarello was out of his car by that time.

"Q Did you and Mr. Chiarello go into your bus to exchange license information?

"A Yes, we did.

"Q Incidentally, when you drove your bus to the other side of the bridge, did you take the names of

"various passengers that were injured?"

MR. SCHULTZ: Objection, your Honor.

THE COURT: What page is this?

MR. LASSOFF: Page 17, the question at line 7.

I will, with Mr. Schultz's permission, omit all questions until line 18 since they are not relevant.

THE COURT: You are going from 7 --

MR. LASSOFF: To line 18.

THE COURT: All right.

MR. LASSOFF:

"Q You in your bus and Mr. Chiarello remained at the site where the accident occurred until the police came?

"A Yes, we did.

"Q Did you remain at that site until a second uniformed vehicle belonging to either the Triboro Bridge and Tunnel Authority or the Port Authority came?

"A The Port Authority came and sent over a yellow police car with a rubber bumper.

"Q Did you witness how eventually Mr. Chiarello's car got over this bridge?

"A Yes, they pushed it over.

"Q Was your bus able to move under its own power after this accident?

"A Yes, there was no damage to the bus.

"Q Did you continue to operate the bus on a regular run after this accident?

"A Yes, I did.

"Q Now, how did Mr. Chiarello appear to you when he came onto your bus?

"A Shaken.

"Q Did you speak to Mr. Chiarello on one occasion or more than one occasion?

"A I spoke to him on two occasions. I think I spoke to him when we had reached the other side of the bridge.

"Q And can you tell us what, if anything, you said to him besides exchanging license information on either of those occasions?

"A I said, 'I am sorry.'

"Q Incidentally, in the bus you were driving, is there a speedometer or some other method of telling speed?

"A A speedometer, a tachometer.

"Q Did you see Mr. Chiarello's vehicle enter this ramp in front of you?

"A Yes, sir.

"Q Was your vision of anything in front of you in any way hampered by the fact that there was this dip in the road?

"A No, sir. But there is a bend where I lost vision of his car momentarily.

"Q Is that before or after the accident?

"A Before the accident.

"Q After the dip or before the dip?

"A After the dip.

"Q Did you know while you were still in the dip that the cars in front of you were braking?"

MR. SCHULTZ: Objection.

THE COURT: Overruled.

"A No, I didn't know they were braking until I got through and seen it.

"Q How much distance was there from the time you passed this point in the bend in the road to the point of the accident?

"A About 75 feet.

"Q So would I be correct in saying at least 75 feet before this accident occurred you had Mr. Chiarello's car and the car in front of him in direct observation?

"A Yes, sir."

THE COURT: Does that conclude the reading?

MR. LASSOFF: That is read in its entirety except for those questions we left out.

THE COURT: We will adjourn now until Monday morning

at ten o'clock in this courtroom. Have a good weekend.

MR. SCHULTZ: If your Honor please, could we have one thing before we terminate because I want to clear it up.

THE COURT: Yes.

MR. SCHULTZ: If your Honor please, just before the luncheon recess the issue came up as to whether or not I would be permitted to comment in summation about the fact that the plaintiff had failed to call Dr. Urs and Dr. Leventhal.

THE COURT: Yes.

MR. SCHULTZ: And Dr. Lanier. Those were the doctors that I had objected to on the basis that they had not -- I had not been furnished a report. I had agreed that I would not comment upon their absence in my summation.

I want to be sure that there is no misunderstanding.

Dr. Gervin was listed as a potential witness by the plaintiff, and I understand - I did understand right from the beginning that he was not going to produce him. I don't want to be precluded from commenting on that, your Honor.

THE COURT: You are not precluded from commenting on that.

MR. SCHULTZ: All right.

(Adjournment to March 8, 1076, at 10:00 a.m.)

tzner gw/lf 409

THOMAS J. CHIARELLO and
ANGELA CHIARELLO

vs.

73 Civ. 2962
75 Civ. 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD

March 8, 1976
10:10 a.m.

(Jury present)

MR. LASSOFF: Dr. Kaplan, would you take the stand.

L A W R E N C E I. K A P L A N, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Dr. Kaplan, are you a physician duly licensed to practice medicine in the State of New York?

A Yes, I am.

Q Do you maintain an office for the practice of your profession?

A I do.

Q Where is your office located?

A My office is at 812 Park Avenue, New York City.

Q Would you tell the Court and jury your professional training, experience, specialties, field of study?

MR. SCHULTZ: If your Honor please, I will concede the qualifications of Dr. Kaplan. I am familiar with him.

THE COURT: All right.

What is your specialty, Doctor?

THE WITNESS: I practice neurology and psychiatry.

Q Doctor, at my request in January of 1976, did you examine Mr. Chiarello?

A Yes, I did.

Q Would you tell us what your examination consisted of?

A The examination consisted of obtaining a history from the patient and reviewing a number of medical reports, hospital and other medical reports concerning his treatment over a period of some years since an injury, and of performing a neurological examination after obtaining his complaints at the time of this examination and during the interval since his injury. The examination was described as a neuro-psychiatric examination, including an appraisal of his mental status as well, but primarily a neurological evaluation, which is a series of tests which reflect the function of the nervous system.

MR. LASSOFF: At this time, your Honor, the plaintiff would like to offer into evidence all of the X-rays taken at the Golden Isles Hospital at the time of plaintiff's first

admission there where the laminectomy was performed.

MR. SCHULTZ: No objection.

xxx (Plaintiff's Exhibit 15 received in evidence.)

Q Dr. Kaplan, would you tell us a little bit more about the specialty of neurology?

A Yes. Neurology is the study and treatment of disorders of the nervous system. The nervous system is made up of the brain, the spinal cord and all nerve structures which emanate from the central organs to supply the head, limbs and trunk.

Q Doctor, would you tell us about the history you obtained?

A Yes. The history in this case was --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Mr. Chiarello was injured in June of 1972 and as a result of this accident, in which he was dazed, he was treated by a number of physicians, complained of persistent pains in the neck, in the arm and in his leg as well as his back, and remained under treatment first at the Richmond Memorial Hospital in Staten Island, where he received various physical therapy treatments, and he was then seen by neurosurgeons and by other physicians and ultimately, when he was in Florida, was admitted to a hospital in December of 1973 and

at that time, following a myelogram, which is a dye test of the spinal canal, he underwent an operation which is called a laminectomy, in which a disc protrusion, which I will describe in a moment, was removed.

And thereafter he continued under medical care. In spite of this operation he continued to have residual difficulties to the point where he was readmitted to a hospital in Florida in July of 1975 and another myelogram was performed, and this again revealed a defect which was suggestive of a disc protrusion but it was elected not to operate on him because of the previous presence of a lot of scar tissue at the time of the original operation.

This history was much clearer in a review of the medical records which was also done at the time of this examination.

When the patient had this accident in 1972, he had been employed as a stevedore superintendent and had been unable to return to any work since his injury.

Now, I did review a number of these medical records. I don't think it's necessary to repeat all of them in great detail but the pertinent records concern his hospitalization and operation as well as the subsequent treatment of the patient.

First, there was a record from the Richmond Memorial

Hospital for his admission in January of 1973, and at that time a myelogram was performed and he was noted to have a small defect in the lumbar region.

A myelogram is a test in which a spinal tap is performed in the lower back region, in the lumbar region, and some spinal fluid is removed through the needle and a radio-opaque dye which is called Pantopaque is injected in the quantities of approximately a tablespoonful, and this dye then forms a column in the canal which is homogenous and is radio-opaque so that it shows up like bone on an X-ray and the patient is then tilted on the fluoroscopic table and this column of dye is moved up and down the spinal canal. During this motion, if there is a tumor, for example, or a disc protrusion, which is a cartilage which is dislocated between two vertebra and presses into the canal, if this is present then a defect is shown in the myelogram and the defect is at the level of the protrusion. In this case he did have evidence of a defect in the contrast column at L4 to 5 and the diagnoses at the Richmond Hospital were those of a disc dislocation, a cervical sprain with involvement of the cervical nerve roots because he had pain in his extremity, his upper extremity, and he also had hypertension and obesity.

I reviewed a copy of the Golden Isles Hospital record

from Hallandale, Florida; for his admission in December of 1973, and at this time it was noted that the patient had had his neck, head and low back complaints since the accident in June of '72 and was admitted where a complete myelogram revealed a disc herniation at L4 to 5 and then he underwent a right hemi-laminectomy with excision of a herniated nucleus pulposis.

Now, in simple terms, the vertebral column consists of a number of vertebral bodies which are connected together by ligaments in front and back and between each body of bone, which is a little disc of bone, there is a softer cartilage, which is called the intervetebral disc. In a sense it represents a cushion so that there can be some motion of the spine and some compressibility of the spine, and the disc itself is made up of two parts, a central gelatinous material which is called the nucleus pulposis, and then a firmer binding outside rim which is called the annulus fibrous. This combination of a doughnut-shaped ring acts as a cushion. If there is a defect in the annulus as a result of weakening injury, then the softer gelatinous material can protrude through it and cause a bulge into the opening through which a nerve root is exiting from the spinal canal to supply in this case the lower extremity.

So the patient had pain and great difficulty in the

right lower extremity and a hemi-laminectomy was done to remove this disc herniation.

At the time of the removal of the disc herniation, which, of course, took place some time after the initial injury in 1972, there were also present marked epidural adhesions, which means scar tissue outside of the membrane surrounding these nerve roots, which usually is the result of slight bleeding at the time of original injury which then forms scar tissue in the same area where there is a disc protrusion.

This was also found and dissected away from the nerve roots in an effort to free the nerve root, and the patient then recovered from the operation but following this recovery he continued to have pain in the right lower limb and at the time of discharge he was ambulating only with the aid of a walker and he had to have continued rest at home.

I reviewed the operative note which in a sense really described the same thing as the summary, and that is the combination of a disc protrusion which was excised and adhesions or scar tissue which were removed to the best of the surgeon's ability.

There was also a hospital record for a later admission of the patient in October, 1974, because the various hospital

and medical notes indicated that in spite of the operation which was done the patient continued to have intractable -- that is constant -- pain in the right lower extremity. So that finally in an effort to provide relief he underwent what is described as a facet rhizotomy. It's an operative procedure which in this case was done percutaneously and that is without cutting the skin, and this is done by means of a radio beam, a radio frequency beam, in which the nerve root at a given level is destroyed, hopefully temporarily, with the hope, sometimes it will return, sometimes permanently, in an effort to prevent pain coming up that nerve root and bothering the patient. Before five or six years ago we did not have this method of doing it and so a major operation had to be done in which the nerve root was cut and that was called an operative or surgical rhizotomy, rhizotomy meaning the cutting of a nerve root. This is done by radio frequency control. Following this procedure even though he had immediate relief from the radio frequency rhizotomy, he then had a recurrence of intractable pain and continued to have pain ever since then.

He did have another myelogram done -- I am trying to find the date of that -

Q I believe it was July 28, 1975.

A Yes, in July of 1975, because of the intractable

pain and because of the failure of the rhizotomy to be effective, he underwent another myelogram, and this myelogram showed a persistent defect, a similar slightly smaller defect at the same level, at the fourth to fifth lumbar level on the same side but it was not clear whether this defect was solely on the basis of a recurrent protrusion of a disc or from the scar tissue which had originally been found at operation.

Because of that, the surgeon could not promise this patient that re-operation to remove a disc, another disc, would provide any relief because he had found so much scar tissue before and because scar tissue by itself can by surrounding a nerve root continue to exert pressure and since it cannot be completely removed he did not elect to insist upon this operation and just offered it to the patient with the limitations that he proposed and the patient felt that this was not something to be elected.

So that he has not been re-operated upon and has continued to have residual difficulty.

Now, when I saw him, and I examined him on January 6, 1976, which is just two months ago, when I saw him at that time he still had residual complaints. He told me that between the period of time that he had the laminectomy, which was the operation for removal of the disc, and the rhizotomy,

which was the nerve root treatment which he had, between that period of time he was forced to wear a transcutaneous nerve stimulator, which is a mechanical device which is attached to the patient by adhesive tape and by stimulating a nerve one can produce impulses which go to the spinal cord and suppress painful impulses. It is like take the patient's mind off his pain by giving him another symptom which prevents the original symptom from coming through.

That worked only partially and he was still disabled and continued to have pain. He complained of not only pain in the right leg and hip but he also had weakness in the fight foot, he complained -- and this is at the time of my examination -- he complained of numbness and pins and needles sensation in the right foot and ankle. He still had sitffness in his neck and pain in the right shoulder. The pain in the right upper extremity would extend into the fingers of the right hand, and I should note that during one of his medical evaluations because of his neck pain he had undergone a procedure called electromyography, which is an electrical testing of muscles in the upper extremity and this revealed some abnormalities within certain nerve roots in the upper limts, that is, in the neck region, but a myelogram in that area did not show a disc herniation. So he did not undergo any operation on his neck and it was felt

that the radicular or nerve root involvement was secondary to the injury to the nerve root rather than disc protrusion.

He complained also of severe headaches, of irritability, of being unable to sleep properly and of having increasing difficulties at home both because of his mood and his irritability and also because of the fact that he had had potency problems since his illness.

He continued to have right buttock pain. The pain radiated to the right lower extremity to all toes. He limped because of his symptoms. He had a weakness of hand grasp on the right side and he was constantly dropping things and he still required the use of a cane. He could walk without the cane but he felt more comfortable having the cane as a support, and he still wore a back corset.

He was suppressed in mood and -- I am looking for other symptoms which he described at that time -- essentially those were the symptoms which he was complaining about. His depression was so severe at times that I noted that at times he had even had some suicidal ideation.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. SCHULTZ: Move to strike it.

THE COURT: Strike it.

MR. LASSOFF: This is in the hospital record.

THE COURT: I am striking it as I have throughout the trial.

A Essentially those were the complaints that the patient had, the most severe difficulties still involving the back and the right lower extremity, but complaints also involving the head, the right upper limb and neck and the mood and emotional state.

On examination -- shall I continue?

Q Yes.

A On examination I found Mr. Chiarello to be quite alert and cooperative. He was tense, seemed depressed in mood to me as he described his persistent disability. He seemed also irritable particularly when he was put through motions which increased his discomfort, but I found no disturbances in sensory column, that is, he was perfectly alert and oriented, not confused. I found no illusions or hallucinations or any great mental aberration.

His neck examination revealed complaint of pain on motion of his neck in all directions. He had some limitation of motion in extension, that is, backward movement of the neck, and in lateral rotation mostly to the right side, that is, in turning his head to the right.

Examination of his back also revealed the complaint of pain on motion of his back, especially in forward bending

and in lateral bending to the right side, and he had limitation of motion in these directions.

He had spasm or increased tightness of the lumbar muscles, the paravertebral muscles on both sides of the low back spine, and also spasm in the cervical or neck region in the back of the neck. His laminectomy scar in the lumbar or low back region was well healed and on testing his stretch test in the lower extremities, he had what is described as markedly positive **Lasegue** signs on both sides.

A LaSeque sign, named after the French physician who described it, is merely a method of stretching the nerve root by first flexing the patient's thigh on his hip and then extending the knee, and that puts stretch on the nerve root in the lumbar region and if there is pressure on it then the patient complains of pain extending into the extremity and he had a markedly positive such sign on both sides, more severe on the right side as compared to the left.

I noted also that he had some paradoxial limit to this in that there was less discomfort and restriction of this kind of motion when the same test was done in a sitting position, in which case it should be almost the same as in the supine position. In his case it was somewhat less when he was sitting.

I found the night knee jerk, which is a reflex,

the most common one people know about, to be diminished as compared to the left knee reflex. The right ankle reflex was actually more active than the left, which seemed diminished to me, and he had some weakness of the --

THE COURT: More active? I don't understand it.

THE WITNESS: What I meant was that the reflex, the left ankle reflex, was diminished as compared to the right, whereas the right knee reflex was diminished as compared to the left. That is, the more active reflex in both cases was considered to be normal and the less active one diminished.

Test of the muscle power revealed weakness of the right foot and toes in dorsiflexion, which is an upward movement of the toes, and of the ankle. This was weak compared to the left side but I could improve this by suggestion and by repetition and by what we call facilitation, by repeated motion, and so I felt that this may not be true weakness but part of a nervous reaction which the patient exhibited.

Also, he complained of pain I noted on this motion and some of his weakness may have been due to his inability to persist in a motion which was uncomfortable.

Sensory examination of the lower extremities and of the upper extremities revealed a diminished sensation to

pinprick, which is the pain sensation used, involving the entire right upper extremity but this was not in an anatomical distribution. Almost the entire right limb was diminished in sensory perception. He walked with a limp favoring the right lower extremity and the remainder of the neurological examination was essentially normal. His balance was actually good, coordination tests were good, all functions of the head, that is, special senses, vision, hearing and so forth, were normal.

Those essentially were my findings.

Q Doctor, before we get to your opinion, may I ask you certain things.

One, when you say that the operation revealed marked adhesions, is the word "marked" of significance to you as a doctor?

A Well, yes. It's significant in the sense that the adhesions or scar tissue were considered to be significant by the surgeon and not easily dissected away. Minimal adhesions are usually not a great problem, but when they become marked and thickened, then they can compress nerve elements in the spinal canal. So I would say that's significant.

Q Doctor, do ordinary X-rays reveal the presence of a herniated disc?

A No. The disc itself is cartilaginous and is, there-

fore not evident on an X-ray. The bone on either side is. If there is a disc herniation of long standing there may be some narrowing of the space which represents the space where the disc is but you cannot see the **protrusion** except by doing a contrast study.

Q May I ask you to show the jury on the shadow box these X-rays that were taken after the Pantopaque was inserted in the spinal canal and show them where the defect was in the myelogram taken, the myelogram in Golden Isles Hospital in Hallandale, Florida, Plaintiff's Exhibit 15 in evidence. Explain what it shows, please.

A This is what a myelogram looks like. Don't be misled by the marker which is the right side, which is upside down. It's just placed upside down. This is the patient with his feet down and his head up so the patient is actually in the erect position on the table with this being the head and this being the tail and this is an upside down marker.

This is an oblique film actually with a partial A-P film which shows a column of dye, this is a column of Pantopaque in the canal. This is the spinal canal which goes right up to the head. This is the disc space. These are the disc spaces. This is the body of the vertebra at each of these levels. This is the fourth vertebral body and this is the fifth. Fourth vertebral body and fifth.

These are slighlty different projections of the same area. This is the sacrum down here. And as one can see, there is a defect on both films on the right side at the L4 to L5 level, that is, the fourth lumbar to the fifth lumbar level, rather clear difference between the right and the left side. This is a defect typical of a disc protrusion.

This again is another film which shows -- this is an A-P film. It doesn't --

THE COURT: I don't know that the jury knows what A-P is.

A Anterior-posterior, which means the picture is taken from the front to the back instead of from the side. So you see the column more symmetrical with roots coming out on each side, this is the middle, and it is not clear from this one A-P view of any disc protrusion or any defect in the column until a slightly oblique view brings out very quickly the defect which is on the right side, which means it is more centrally located which is the way it was described in the hospital record. A more centrally located disc will not show up clearly in a view which in a sense covers the entire disc from front to back. When it's more centrally located you have to turn the patient slightly to see the defect produced on the myelogram and that's what they did and there is a very clear defect at the same level.

So this represents a disc protrusion at L4 to 5 on the right side.

Q Doctor, so you can get rid of the shadow box, I ask you to show the jury the myelogram that was taken on July 28, 1975. I believe this is in evidence already but I am not sure. I think all the X-rays and myelograms went in evidence before, did they not?

THE COURT: Ask Mr. Schultz.

MR. LASSOFF: Did they all go in before?

MR. SCHULTZ: I can't remember.

MR. LASSOFF: I will offer that myelogram in evidence, your Honor.

MR. SCHULTZ: Let me check.

THE COURT: If they were in evidence there would be a clerk's mark on it.

MR. LASSOFF: I will offer them in evidence now, your Honor.

MR. SCHULTZ: No objection.

xxx (Plaintiff's Exhibit 16 received in evidence.)

Q Doctor, would you pick out whatever films you need and explain what those latest myelograms show to the jury?

THE COURT: Is this July, '75?

MR. LASSOFF: July, '75.

A There are three films that I have picked out.

This is a better film in terms of the radiologic detail but this is also an A-P myelogram, that is, front to back, symmetrical. This is the lower lumbar spine, this is the pelvis on each side. This is the sacrum and this is the column of dye, this is the location of the needle which is placed higher than where you want to feed the spine so it doesn't interfere with it. You can see on this film there is still a defect on the right side at the fourth to fifth level. This is the fifth lumbar vertebra, this is the fourth lumbar vertebra. In addition to the defect, however, and this is what disturbs the interpreters also, there are thin streaky pieces of Pantopaque. As you can see here it is not a clear defect. It is very suggestive that this is associated with scar tissue. That is the way scar tissue appears on a myelogram, little thin streaks of Pantopaque because it can't fill it as a homogenous mass.

This is another view, oblique now, slightly tilted to one side, again showing a defect. These are facing each other, so to speak, on the right side, and again in this film, in addition to the defect one can see thin films of streaky material or lines in it which suggest significant scar tissue as being responsible for at least part of the defect.

This is a lateral view. Lateral means the patient view is taken from one side to the other so we see the vertebral

bodies as we look from one side. This is the sacrum, fifth lumbar and fourth lumbar vertebra. This is the level of the defect. You can see that the Pantopaque doesn't come out to the edge of this. In addition, there are thin lines that extend through the column suggesting that there is scar tissue at this level in the spinal canal.

MR. SCHULTZ: Could we have those marked. I think it is exhibit 15.

THE COURT: Sixteen.

MR. SCHULTZ: Could we have the ones he used marked A, B and C or whatever the Court directs?

THE COURT: A, B and C.

(Plaintiff's Exhibit 16A, 16B and 16C received in evidence.)

xxx

Q Doctor, I ask you to look at the surgical report of the Golden Isles Hospital and tell us about what the surgical report reveals to you as a doctor.

MR. SCHULTZ: Objection, your Honor.

THE COURT: I think you ought to have a more specific question.

Q Would you explain the operation that was performed, Doctor?

MR. SCHULTZ: Objection.

THE COURT: That's been done already by a doctor who

was present.

Q As a neurologist, is there anything in that surgical report that is of particular interest to you?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes. I first have to find it, though. I have it.

Yes. The important aspects of this neurologically were not obviously the performing of the disc excision, which is removal of the protruded disc which was found at operation, but following this decompression, following the removal of the disc, it was found that the nerve root was markedly adherent with scar and was frayed, which meant that it was spread apart, the fibers were spread apart, and there was also a small rent in the dural sleeve. This was closed. This means a small tear in the dural sleeve which is the covering of the nerve root extending out from the spinal canal. This was closed with sutures and the important things were the fact that there was adherent scar and also a rent in the dural sleeve probably produced by the surgical removal of the scar or in trying to locate the scar, because the scar is very adherent to the dura, which is the membrane around the nerve root.

Those are the significant findings because of the subsequent myelogram particularly.

gw/lf Kaplan-Direct 430

Q Was the rent in the dural sleeve of any significance?

A Well, it was repaired so I wouldn't say it is of any significance.

Q Thank you, Doctor.

Now, Doctor, would you give us your opinion based on your history, your examination and your review of records as to what Mr. Chiarello's condition was in January of 1976 when you examined him?

A Yes. It was my opinion that this patient continued to have a major problem involving his low back with continued muscular and nerve root symptoms on both sides but especially involving the right lower extremity. And this was secondary to the disc protrusion and to the multiple scarring of the epidural space and around the nerve roots which were found at the time of operation. In my opinion this was secondary to his injury. And he still had these difficulties. And I agreed with the treating neurosurgeon that --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. SCHULTZ: If your Honor please, the treating neurosurgeon has never testified.

THE COURT. The treating neurosurgeon's opinion is in the hospital record which is in evidence.

MR. SCHULTZ: I respectfully except, your Honor.

A I agreed with the opinion as I read it in the medical records available, at any rate, that offering this patient another operation to remove a disc which seemed to be present on the repeat myelogram was fraught with the danger of lack of success and perhaps even increasing symptoms because of the likely contribution of scarring around the nerve root to his problem, and this cannot be removed adequately surgically.

In addition to -- he also had had a neck injury and had residual symptoms related to his neck. I did not feel this was the prominent problem at this time although he still had some problems involving the right upper extremity, but as far as his back was concerned and in spite of all of the treatments, including rhizotomy, he has still an intractable pain and, therfore, a guarded progrosis. I can't see that there is any relief for him in sight in terms of medication other than strong, very strong, analgesics or narcotics. As a result of his chronic and intractable pain significance, it was my opinion that he had developed rather chronic emotional reaction with anxiety and depression --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Not infrequently seen in patients who have had pro-

longed disability and physical complaints. This was compounding his difficulty and was exhibited on examination by some findings which were related to his emotional state rather than to the underlying physical state.

Essentially that was my opinion. He did have a potency problem, as I indicated before. It was my feeling that this was related to his anxiety and depressive reaction, his emotional reaction, his ability to perform, the alteration --

MR. SCHULTZ: Objection, your Honor. Move to strike.

THE COURT: Overruled.

A The alteration in his concept of his masculinity because of the prolonged disability he had had. I did not find adequate evidence that the potency was related to nerve problems which can happen in operations and difficulties in this area of the spine. But it was my feeling that there was inadequate evidence that nerve roots to the genital and paregenital area were involved and I felt that the potency problem was largely psychological.

Q Is a psychological problem as real to a patient as a physical problem?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q In Mr. Chiarello's case?

A Oh, yes, it is.

Q And in relation to potency, is it as capable of rendering a patient impotent as a physical injury?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Oh, that's well known. Yes, it is.

Q Doctor, you have used the word "chronic and intractable pain."

Would you tell the jury what that means medically?

A I mean in spite of all medical and even surgical efforts to relieve nerve root pain, this patient continues to have the same problem. That makes it intractable, that is, not remediable to the treatments which have thus far been administered. Of course, there are other operations to consider possibly in the relief of such intractable pain, but these become much more major and leave the patient with some residual disability which he may not like. There are operations such as operating on the spinal cord and actually interrupting the pathway of pain from the lower portion of the body to the brain.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A This is called a cordotomy and this is used with some patients who have intractable pain. Patients in this relatively young age group, since it will be associated with loss of

sensation, pain and temperature below that level, below the level of operation which would be in the chest or neck area, it is usually not offered initially.

Q Doctor, you say intractable pain coming from a nerve root. Could you tell the jury in layman's language the type ofpain that comes from the injury Mr. Chiarello has, a scarring and the adhesions in the spinal canal?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A The type of pain he has is call radicular or nerve root pain, and this tends to be a combination of dull aching and sharp shooting pains, very often associated with a burning quality, and very uncomfortable. Root pain is perhaps one of the most uncomfortable pains. Perhaps the only other pain that is more uncomfortable is a severe precordial pain when one has acute coronary which can be quite bad, but I would say root pain is perhaps one of the most severe pains that the body has to endure.

Q Doctor, I want you to assume that on June 30, 1972, Mr. Chiarello was in his car which was stopped behind another car waiting for a third car to go through a puddle on the Bayonne Bridge when he was struck in the rear by a bus with enough impact to force him backwards against his seat and to break the driver's seat of the car throwing him down

flat, that his car was propelled into the car in front of him a distance of at least ten feet, striking the car in front of him and tossing him back up, causing him to strike his head on the visor and be draped over the steering wheel and that he was white and shaken at the time, that he came under the care of a Dr. Spitz who found that he had sustained an acute tortocollis and a lumbosacral derangement, that he came under the care of various other doctors, that he was sent to the Richmond Memorial Hospital in Richmond, Virginia, where a myelogram revealed a herniated disc at L4-L5, that he was seen by a Dr. Friedman who once again found a herniated disc at L4-L5, that he was seen by Dr. Leone and Dr. Gervin, who also found a herniated disc at L4 and L5 in addition to the cervical radiculitis and other injuries, that he was operated on at the Golden Isles Hospital in Hallandale, Florida, in December, 1973, and a right hemi-laminectomy was performed and the surgeon reported the findings that you have told us about. In addition to removal of a nucleus pulposis he found marked adherent scarring.

In your opinion, Doctor, with reasonable medical certainty, was this accident a competent producing cause of those injuries?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A In my opinion, it was.

Q Doctor, when this accident occurred and Mr. Chiarello sustained a herniated disc, what, if anything, caused the scarring which you say was present at the time of the operation?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A As I indicated before, the scarring is produced by small amounts of bleeding over the surface of the dura when there is a sudden change in the annulus. There are tiny little blood vessels. They tend to bleed without a lot of bleeding. It is not a major hemorrhage. A small amount of red cells set up a scarring process and when they heal there is scarring around the nerve roots in the location of these vessels.

Q Incidentally, is this scarring which you are talking about inside the spinal canal?

A Yes. It's inside the spinal canal and outside of the nerve element. That is, in this area of the spinal canal we don't have the spinal cord. The spinal cord, which is continuous with the brain, ends at the first lumbar vertebra. Below that level there are a number of nerve roots coming down to exit at the different levels. This is called the cauda equina or horsetail because of the

appearance of these nerve roots, and it is outside of the membrane where these nerve roots are contained that the scarring takes place. This is called epidural scarring. Outside of that dural membrane. The nerve root has to come through that membrane to come through the operation. They, therefore, have to traverse the scarred area. That is why they become irritated and compressed.

Q Doctor, when there is a disc herniation, is the onset of pain cumulative, relevant, instant?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes. What happens is that very often there is some history of a back injury and perhaps even with some back complaint as a result of damage to the annulus or the enclosing membrane of the disc, and then as time goes on, it could be days or weeks or even longer than that, because of the weakened annulus there is more and more protrusion of the disc at that weakened spot and, therefore, the patient will have increasing pain and perhaps he will not have initial nerve root pain to the lower extremity. This may develop when the protrusion becomes larger and actually compresses the nerve root or when scarring becomes more involved and takes time to form and, therefore, irritates a nerve root.

Q Doctor, the pain that Mr. Chiarello has had since his first operation, in your opinion, Doctor, did that come from the removal of the herniated disc or the scarring at the site of the injury?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I am sorry. The pain prior to the operation?

Q After the operation.

A After the operation. Well, I would say the pain that this patient has had since his operation is most likely -- we can't be crystal ball gazers because we don't know what is going on in the spinal canal now -- but from the recent myelogram in 1975 and from the findings at operation, I would say that his major problem now is the scarring. The disc was removed and excised at the time of the original operation. There were no free fragments of disc left in the epidural space. The operative note is quite clear about this. So I would think it is less likely he has a recurrent disc herniation with more of the degenerative coming out through that opening than the scar tissue is causing this problem.

Q Would I be correct in stating if you went into Mr. Chiarello's spine again to remove that scar tissue the operation itself would create more scar tissue?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes. That is why a good result cannot be assured this patient because the removal of scar tissue is too often unsuccessful because the operative procedure causes more scar.

Q At the time of your examination, Doctor, what was your opinion with reference to Mr. Chiarello's ability to work as a stevedore superintendent, or terminal superintendent?

A In my opinion, he could not do that work.

Q In your opinion, Doctor, would his condition in the future remain the same, get worse or improve?

A Well, at the present time, on the basis of his current situation without any additional treatment, I would say it would remain either the same or get progressively worse as scarring increases. However, should it be necessary ultimately to consider other forms of treatment, including the surgical intervention which I mentioned, then he may have improvement in his pain with such procedures.

Q Would the improvement in the pain make it possible for Mr. Chiarello to work?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, because if he has operative improvement in

his pain, he is going to be left with absence of pain and temperature sensation in one extremity, and this would interfere with his ability to work because he would not be able to detect injury.

Q Incidentally, Doctor, Mr. Chiarello walks with a cane in his right hand. Does it make any difference in which hand he carries his cane?

A I don't know what you mean does it make any difference. Because he has trouble with his right leg, you mean?

Q Yes. The doctor suggested he should be carrying the cane in his other hand. What is your opinion?

A I think that depends.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I would say that depends on the patient. He has to put his weight, most of his weight he has to put on his left lower extremity. This patient has findings in both legs and he has a disc which even though it is more on one side is centrally located. He may have problems with his left leg as well. How he uses a cane, people use it differently, will depend on the patient. Some will use it for support and, therefore, will use it in the same hand as the weak leg. Others will use it on the opposite leg to

lean on to raise the bad leg. So I think it varies with the patient.

Q Doctor, I believe the patient has testified that he is now taking Percodan and Fiorinal.

A Fiorinal.

Q Is Percodan a narcotic?

A Yes, it is.

Q Aside from strong narcotics, can you see any medication that would help Mr. Chiarello with his pain?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, in my opinion, I don't like using Percodan because it is a codeine derivative drug. I don't like using it but sometimes it is the only thing that will give him relief. Fiorinal is a combination of an analgesic and sedative and is inadequate alone to give this patient relief.

Q Doctor, can you think of any other method aside from major narcotics and the operation you have described for us that will give Mr. Chiarello relief from pain?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, sir.

Q At the time you examined Mr. Chiarello, did he appear to you to be in pain?

A At various times during the examination. At times he seemed more comfortable when he was sitting in one position without his extremity being stretched in any way or movement being involved because sometimes if a nerve root is kept very quiet, if the knee is flexed and the hip flexed in a sitting position for awhile the patient may experience relief, and then the pain will increase and he will have to change that position. They can't stay in one position for too long. But he could periodically have some relief of pain based upon getting into a very comfortable position. But very slight movement is going to produce discomfort because of the scarring around the nerve root as soon as it is stretched and the scarring irritates that nerve.

Q Doctor, the injuries that you say were caused by this accident with reasonable medical certainty, would they with reasonable medical certainty be a competent producing cause of his disability?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I would say so.

Q And were they the competent producing cause of his herniated disc, the scarring and pain that he is suffering from?

A Yes.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes.

Q Doctor, what, if any, work would Mr. Chiarello be able to do now or in the future?

A Well, I can't tell you that, but I think that some effort should be made to rehabilitate him in some field where he can frequently rest when he is uncomfortable and do something in a sedentary fashion. I think it is important from an emotional point of view. I don't think he can do any physical work but I think that some effort should be made to rehabilitate him in some area for improvement in his psychological state, to give him some feeling of self-worth.

Q Can you think of any work that he can do, Doctor?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not offhand. I would advise his seeing a vocational counselor who can perhaps find some kind of protected environmental -- protective workshop in which he can begin to do something and rest at any time he wants. It would sort of be the kind of workshop that initially would be similar to those run by the Institute for the Crippled and Disabled, where people work whenever they can and don't work if they are uncomfortable, using their hands if they can

and not their legs. But I think it would have to be a protected environment of some kind.

MR. LASSOFF: Thank you very much, Doctor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Dr. Kaplan, you have examined litigants in my behalf, have you not?

A Yes, sir.

Q Dr. Kaplan, you have testified in court on many occasions, isn't that true?

A Oh, yes, that's correct.

Q Doctor, in examining litigants you furnish a report to the lawyer who may have requested your services, isn't that true?

A Most often, sure.

Q Doctor, you examined this gentleman on January 6, 1976, isn't that true, sir?

A Yes, sir.

Q Sir, you were also examined and gave testimony with relation to this gentleman on January 14, 1976, isn't that true?

A Yes, sir, according to my notes.

Q And at that time, sir, I asked you certain questions,

too, isn't that true?

A Yes, I am sure you did. I don't recall what they were.

Q Dr. Kaplan, you reviewed, I am sure, in the preparation of your report, the hospital records, isn't that true?

A Yes, sir.

Q Doctor, in attempting to reach an opinion as to this gentleman's condition as of January 6, 1976, I am sure that you considered his overall health picture, too, did you not?

A Yes.

Q Doctor, did you find, in reviewing this man's records and also your own examination of him, that he had been suffering from hypertension?

A Yes.

Q Doctor, could you tell us over what period of time this gentleman had been suffering from hypertension?

A I can't offhand. I do know that it was one of the diagnoses in the hospital record. Perhaps I can find it.

Q In any event, you did state, I think, in reviewing your examination of him, that you told us he was hypertensive?

A Oh, yes. This was noted in a hospital record. As a matter of fact, in the first hospital record which was in January of 1973, at the Richmond Memorial Hospital.

BEST COPY AVAILABLE

Q Doctor, would you tell us, if you would, what hypertension is or what your definition of it is?

A High blood pressure.

Q Doctor, did you also ascertain that this gentleman had had a hiatal hernia?

A I believe that was in some record. I don't recall that offhand.

Q Doctor, did you also in your testimony today say -- I believe you said -- that he was suffering from hypertension and obesity, is that correct?

A According to the record, yes, that was one of the diagnoses, and he is overweight, yes.

Q Doctor, did you also ascertain whether or not this man has any smoking habits?

A Yes. According to my record, I take a routine history of this, he smoked two packs of cigarettes a day.

Q Doctor, I want you to tell us in your opinion with the combination of hypertension, in other words, high blood pressure, obesity and smoking on some occasions two packs of cigarettes a day and other times it was three packs of cigarettes a day, would you tell us, Doctor, will that in your opinion, those factors, will that decrease this gentleman's life expectancy?

A Well, I can only tell you that it's possible it

could. I would advise him to get treated for hypertension, stop eating so much and stop smoking.

Q Doctor, those factors, does that normally, in medical parlance, in your opinion, would it decrease his life expectancy?

A I am not a statistician. I think you would have to ask a statistician about that.

Q You don't want to venture an opinion on that?

A I am sure it might in combination be one of the factors which make one more susceptible to certain vascular disorders, but it need not happen. That is what I mean.

Q Doctor, would you tell us in this particular case, in this operative procedure -- it was a hemi-laminectomy, was it not?

A Yes.

Q Doctor, did the operating surgeon remove the entire disc or merely the protruding portion?

A Well, my recollection is only the protruding portion. May I check that for just a moment?

Well, he may have removed most of the disc itself. It's not clear from the operative note. The operative note indicates that there was free disc bulging through the annulus and they performed a disc excision using curets, which means going into the disc space and removing the disc

itself, and they excised approximately eight cc. of degenerated disc material, and eight cc. is almost two teaspoonfuls of disc material. That's almost the size of a disc itself in terms of volume. So they may have removed most if not all of it.

Q Doctor, do you recall that when you last testified you testified that they only removed a portion of it?

A I may very well have, and I still would say that it does not indicate here that they removed all of it. I am just estimating it from the quantity which I perhaps was not asked to look at before.

Q Doctor, with relation to the A-P view of the myelograms, I believe you told us that the defect or the protrusion was not clearly visible?

A Correct.

Q Doctor, it did become visible on the oblique views?

A We are talking about the original myelogram?

Q Yes.

A Yes.

Q That was at the L4-L5 interspace, is that right, Doctor?

A Yes.

Q Doctor, would you tell us what -- withdrawn.

The L4 interspace and L5 interspace, Doctor, is a

space at which there is a foramen located, isn't that true?

A Between the fourth and fifth space, yes.

Q A foramen is a passageway through the spinal vertebra, vertebral portion, through which the nerve root emanates, is that correct?

A Correct.

Q It's a passageway through which the nerve comes out?

A Yes, sir.

Q Doctor, would you tell us what nerve comes out at the L4-L5 interspace on the right?

A The fifth lumbar nerve root.

Q Doctor, is that part of the sciatic nerve?

A Well, it's not part of it, but it contributes to the sciatic nerve. There are five nerve roots contributing to the sciatic nerve.

Q Doctor, does it also contribute to the peroneal nerve?

A Only because the peroneal nerve is a terminal division of the sciatic nerve. So, yes.

Q Doctor, you are the neurologist, right?

A Yes, sir.

Q Doctor, when there is a defect on that right side of any sort, from whatever the origin is, does it show pain

on the right side, does it end up with pain on the right or does it cross over?

A Oh, the pain is on the same side. Well, if the defect is responsible for the pain, then the pain is on the same side.

Q Doctor, in this particular case at the operative procedure there was a rent in the dural sleeve, isn't that correct?

A Yes, sir.

Q That was a surgical rent, isn't that true?

A It doesn't state so, but I would assume it.

Q In other words, the surgeon caused a tear into the sleeve, the dural sleeve, is that correct?

A In attempting to expose lesions, this happens, yes.

Q Doctor, the dural sleeve, as I understand it, and you tell us if I am wrong, is a protective device around the nerve root itself?

A Yes.

Q It's a covering, it's a sheathing, isn't this true?

A A sheathing which ends at the foramen where the nerve exits without it.

Q Doctor, you also said to us, I believe, that the

subsequent X-rays or myelograms indicated to you stringing? Is that a proper term?

A I didn't use that term but that is a proper word.

Q Stringing of the Pantopaque?

A Yes.

Q That stringing indicated to you, I believe you told us, that in your opinion it was scar tissue rather than a further protrusion of the disc?

A Well, what I stated was that it suggested that it was scar tissue with or without some underlying disc protrusion, which could not be determined postoperatively.

Q Normally stringing is attached to scarring, isn't that true?

A Correct, yes.

Q In other words, if you see stringing you usually conclude that there is scarring?

A Well, usually I do. Sometimes in Pantopaque based upon the way you are injecting it, if you don't inject it steadily there may be stringing of Pantopaque throughout the column if you do it in spurts rather than a steady column.

Q That would be a defect or an improper procedure on the part of the X-ray man, isn't that true?

A It would be a technical difficulty, yes.

Q Now, Doctor, going back now to the distribution of this nerve that came out of L4 or L5, which you told us contributed to the sciatic nerve -- isn't that correct?

A Right.

Q This nerve is both a motor nerve and a sensory nerve, isn't it?

A Correct.

Q In other words, it supplies movement as well as sensation?

A Yes, sir.

Q Correct?

A Yes.

Q Now, Doctor, you told us, I believe, that the **Lasegue** signs, which was the stretching, was on both sides?

A Yes.

Q Correct?

A Yes.

Q Not just the right but on the left?

A Both sides but more pronounced on the right side.

Q And then, Doctor, you used the word "paradoxical."

A Yes.

Q Do you agree with me that paradoxical means contrary to what is normal?

A Well --

Q What did you mean by paradoxical?

A I think it would be better if I told you what I meant, yes. Paradoxical in terms of these findings means that the findings did not adequately explain -- were not adequately explained by structural abnormalities in the nervous system.

Q In other words, Doctor, what you were saying to us, I believe, was that he had more severe on the right when he was not sitting but it was contrary when he was sitting?

A It was less severe when the same test was done in the sitting position, yes.

Q Doctor, that to you -- withdrawn.

Does that indicate to you, Doctor, that this is not in accordance with the anatomical description of that nerve?

A I would say with regard to the **Lasegue** test not totally in accordance. It was not normal in the sitting position, it was just not as marked in the sitting position.

Q Doctor, you also told us that you did the right knee jerk right?

A Yes.

Q And it was more diminished on the right than on the left?

A Correct.

Q Doctor, does the same nerve or the same set of nerves control the right knee as the right ankle?

A One does, yes. The fifth lumbar nerve root has a contribution to both the knee and ankle reflex in most people. The L-4 nerve root, which is also very often involved in patients who have an L4 to 5 disc protrusion, is the primary supply of the knee jerk. The S1 nerve root is the primary supply of the ankle jerk. L5 can contribute to either one in an equal or unequal proportion.

Q Doctor, in any event, normally if you have a diminished right knee jerk you would have a diminished right ankle jerk, isn't that true?

A Oh, no, not at all. Not necessarily, no. You may have primary involvement of the fourth and fifth lumbar nerve root where the fifth lumbar nerve root contributes very little, if any, to the ankle reflex.

Q In other words, Doctor, what you are saying is that you didn't attach any significance to the fact that the right knee jerk was diminished and the right ankle jerk was greater than that on the left?

A Oh, sure I attached significance. The significance I attached was that there was involvement of the fourth and fifth lumbar nerve roots as evidenced by the knee reflex

being diminished on the right side and very likely some involvement even without great pain of the S1 nerve root on the left side since the patient also had a partially positive **Lasegue** or stretch test on the left and it's well known that since he had a centrally placed disc originally that there may have been some material pressing against the left nerve root which was never removed.

Q Doctor, this same nerve root supplies motor power as well as sensation, does it not?

A Yes, it does.

Q Doctor, did you find some weakness in the right foot and toes in the dorsiflexion?

A Well, my answer is yes and no. I found some weakness. I did not attribute it to motor involvement of the nerve root. As I indicated before, I could improve it by suggestion.

Q Doctor, you found that this gentleman, when you tested him, you found some weakness in this right foot motor involvement, isn't that true?

A Initially, yes.

Q However, after you worked with it you found it improved by suggestion?

A And by my insistence that he could contract it briefly and, therefore, not experience pain and then relax

it quickly because pain may have been contributing to it. And when he did that for just a moment the strength was pretty good.

Q Doctor, you also found that there was no anatomical defect which would contribute to this motor weakness, isn't that true?

A Well, I would say I just didn't attribute the weakness of his foot to involvement of the nerve root. You can have irritation and pain in a nerve root without having motor involvement. I did not feel that the weakness was related to the nerve root involvement but rather part of his superimposed psychological reaction and perhaps pain in itself.

Q Doctor, you also performed some sensory examination of this gentleman, did you not?

A Yes.

Q And, Doctor, did you find that he complained of diminished sensation?

A Yes.

Q Also, Doctor, did you find that these complaints of diminished sensation did not correspond to the distribution of the nerves?

A That's correct.

Q In other words, it could not be explained by the

distribution of the nerves?

A Oh, that's correct, yes.

Q In other words, it was wholly within himself?

A I would say it was a psychological reaction and not one due to the nerve root involvement.

Q Now, Doctor, with relation to the operative procedure itself -- do you have the exhibit?

A I have it here.

Q May I see that for just a moment, please?

A Surely (handing).

Q Doctor, there was on this operative record a report of scarring and adhesions, isn't that true?

A Yes, sir.

Q And there also was a report of fraying?

A Yes.

Q Doctor, I questioned you on a prior occasion pertaining to this matter as to the **etiology** and the origin of scarring and adhesions, do you recall that?

A No, I don't.

Q That was January 14th. Will you tell us, incidentally, Doctor, how many patients you have seen since then?

A No, I couldn't possibly.

Q Your best estimate.

A I can't tell you that. I see many patients each

so I can't tell you that.

Q Doctor, on that prior occasion I asked you whether there was any way that you could tell us how long a period of time this scarring or adhesions had been present in this man's spinal canal or at this particular foramen, and I believe you told us you could not.

A I would say the same thing now.

Q Doctor, there is, as far as you know, no way in which you could tell how long this scarring had persisted in this man's back?

A That's correct, yes.

Q Doctor, did you know that this man had testified that for a continuous period of time of at least ten or eleven years preceding this occurrence he lifted weights from one pound to a hundred pounds and that he --

MR. LASSOFF: May we have a clarification, your Honor, that he lifted weights in the course of his work and not as a weight lifter?

THE COURT: Go ahead.

Q To clarify it, Dr. Kaplan, this man lifted weights, parcels, packages, whatever it may be, in the course of his employment, not as a weight lifter from one pound to a hundred pounds, that he also moved sliding freight car doors; were you told of that, Doctor?

A Well, I was told he was a stevedore at one time. I think I must have assumed it involved heavy lifting.

Q Doctor, can heavy lifting cause back injuries?

A Of course.

Q Doctor, can the pulling of a railroad -- the pulling of a weight, will that have on -- on some occasions, can that cause back injury?

A It may, yes.

Q Doctor, with relation to this gentleman's claim of lack of or incapability of completing a sexual act, did you conduct a neurological test in and about his sacral region?

A Yes.

Q Doctor, what is the nerve or nerves that supply or control the sex act, Doctor?

A Well, they are controlled through a plexus of nerves in the pelvis which are fed primarily by the lower sacral nerve roots, third, fourth and fifth low sacral roots, which are lower in the canal than the lumbar root.

Q These nerve roots would emanate from S2 and S3, wouldn't they?

A Yes, but they travel as nerve roots in the spinal canal from the first lumbar vertebra down since there is no more spinal cord.

Q I understand that, Doctor. In other words, the actual nerve roots which have an effect on the sexual act would, I think, emanate from S2 and 3?

A That is where they emanate from the canal, yes.

Q Did you find any nerve involvement pertaining to the nerves that control the sex act?

A I indicated that I did not.

Q Doctor, this rhizotomy that was performed I believe it was in October of 1974 --

A 1974, yes.

Q -- Doctor, that procedure, first of all, it does not involve any cutting, does it?

A That's correct.

Q In that sense it is not a surgical intervention, is it?

A It's classified as one but it is not really in that sense.

Q Doctor, this is done by the use of, I believe, electrodes, is it?

A Yes.

Q Doctor, this transcutaneous nerve stimulator, this is an electrical device, is it not, the purpose of which is to supply an electrical impulse to the affected area?

A Yes, to supply an electrical impulse to suppress

cutaneous pain. I would say not very much unlike acupuncture.

Q This is done through the application of electrodes which are contained in a pad, isn't that true?

A Usually, yes.

Q Doctor, does the use of this pad -- withdrawn.

Doctor, do you know the amount of current that is supplied by this stimulator?

A No, I don't, but it's a very small amount in terms of amperage.

Q Doctor, this is supplied by a battery, is it not?

A Yes.

Q The current, the energy?

A Yes.

Q Doctor, does this device with these pads, does it produce burns?

A In some cases it has if it is used excessively even though it is battery operated, yes. Usually it doesn't. You are advised not to do it to that extent.

Q Doctor, is it capable of producing a first or second degree burn?

A Well, I would say first degree. I have never seen a third degree burn with it.

Q How about second degree?

A Well, I don't recall seeing any. I don't know what the literature says. First degree are seen with any stimulator. It is discoloration of the skin.

Q That is about the extent of it, isn't it?

A Usually. I suppose it could go further. I haven't seen it myself.

Q After this rhizotomy I assume you saw the hospital record which indicated this man had immediate relief.

A Oh, yes. I indicated that.

Q Doctor, nerves, if they are severed or even sometimes partially destroyed, they regenerate, do they not?

A Yes.

Q Doctor, the scarring regenerates or comes back, anyway?

A Are you talking now about epidural scarring in this case?

Yes.

A I don't know what you mean by coming back. If it is removed it frequently returns because of the additional oozing and bleeding at the time of any operation. You are bound to have the regrowth of scar tissue in a patient who has already grown some.

Q Doctor, this rent in the epidural sleeve that was caused surgically, that caused blood, did it not, or some

BEST COPY AVAILABLE

blood? It would bleed, wouldn't it?

A Not necessarily. It depends if a blood vessel is involved. There are very tiny ones. Usually it involves leakage of spinal fluid. That is the reason to close it, to prevent an arachnoid cyst. That is why a rent is closed by surgery.

Q And it was closed with sutures?

A Yes, of course.

MR. LASSOFF: I believe the testimony has been one suture, your Honor, throughout.

THE COURT: You used the plural. The doctor before said one.

Q Was it one suture, Doctor, do you know?

A It was, according to the hospital record.

Q Now, Doctor, your field is neurology and psychiatry, isn't that true?

A Yes.

Q And the treatment of fractures of the bone and the handling of the patients with relation to bony injury, fractures and dislocations, that's in another specialty referred to as orthopedics, isn't that true?

A Except for fractures of the skull and some fractures of the vertebral column, where they are enclosing nerve tissue, yes. Fractures of long bones are orthopedics, yes.

Q Legs?

A Yes.

Q Tibia, femur?

A Correct.

Q Within the realm of orthopedics?

A Yes, it is.

Q And also the problem of weight bearing and walking, that's an orthopedic problem, too, isn't it, Doctor?

A Unless there is a neurological explanation for it, it may be.

Q But normally it is within the field of orthopedics?

A There are many walking difficulties related to neurological disorders.

Q I know, Doctor. I don't want to fence with you.

THE COURT: Your question is normally is it orthopedics, and you say if it is related to nerve involvement it is not normally related to orthopedics?

THE WITNESS: That's right.

Q Doctor, do you -- incidentally, Doctor, did you find any neurological explanation for a weakness in the grasp of his right hand?

A No. I felt that -- I am sure I felt that was also functional in the sense that it was not the kind of weakness I would expect on the basis of the nerve root involvement.

Q In other words, Doctor, there was no explanation for this claimed weakness of grasp from a neurological explanation?

A From a structural point of view, that's correct. From the point of view of pain in the extremity and complaints, no.

Q Doctor, pain, of course, is subjective, isn't it?

A Why, of course.

Q In other words, the patient can say he has pain even though he has none?

A I suppose he could. I don't think he would go through operative procedures like this.

Q I am not saying -- I am just trying to show, Doctor, that pain is subjective.

A Yes, of course.

Q And the claim of a diminished grasp is also subjective unless you use the machine?

A It is as subjective with the machine as with my hand because one can squeeze as hard as one wants to.

Q You don't use --

A No, I don't use it. It is unreliable.

Q You don't use it?

A Never do.

Q In any event, Doctor, you found no neurological

gw/lf Kaplan-Cross 466

explanation for the diminished hand grip, did you?

A That's exactly correct, yes, no interference with nerve root to explain the weakness, yes.

Q Did you find any atrophy of the muscles that would control his grip?

A No.

Q And by atrophy we mean a wasting or shrinking, isn't that true?

A Correct, yes.

Q And there was none present?

A I found none.

Q And if there was a wasting or shrinking, that would indicate to you nonuse, isn't that true?

A Yes, or specific involvement of the motor nerve root to produce paralysis and wasting because of paralysis.

Q So none of that was present in this man?

A No.

Q Doctor, what about his calf, right calf and left calf? Did you measure them?

A I don't measure calves or muscles. Orthopedists do. If I can see a difference which is clinically evident to me, I don't consider it important neurologically.

Q Doctor, did you see any wasting or atrophy of the calves?

A No, sir.

Q Did you see any wasting or atrophy of the thighs?

A No, sir.

Q Did you see any wasting or atrophy of the buttocks?

A No, sir.

Q In other words, Doctor, you saw no signs of nonuse in that area, in those areas?

A This patient uses his extremities, so he is not nonusing it. He is not paralyzed.

Q When you --

A I was not told that he was bedridden or chairridden, if that's what you mean.

Q Doctor, did you establish through your observation that this man could walk without the use of a cane?

A Yes, as I indicated he could walk without it but with difficulty during the few steps I asked him to take without it in the office.

Q Doctor, with relation to this gentleman's capability of working, in your opinion, based on reasonable medical certainty, Doctor, is this man capable of performing sedentary work?

A Well, only with limitations.

Q What limitations, Doctor?

A The limitations of being able to take time off when

BEST COPY AVAILABLE

he is uncomfortable and to continue to change his position and to be free to not work on a continuous basis.

Q Doctor, would you be able to state with reasonable medical certainty, could he work say standing or sitting and then be able to move about and then recommence?

A Well, I would say with difficulty and with rest, perhaps, yes. I would even advise it, as I indicated before, as a therapeutic effort.

Q In other words, Doctor, this man is capable of performing some sedentary work?

A Well, if you use the word "some" I can't disagree with it. I think it is very limited.

Q Doctor, when one -- withdrawn.

MR. SCHULTZ: I have no further questions.

REDIRECT EXAMINATION BY MR. LASSOFF:

Q Doctor, would a man with a herniated disc and the scarring that was found on the operation be unaware of pain prior to this accident if he had these conditions prior to this accident?

MR. SCHULTZ: Objection.

THE COURT: I think the question is the scarring I gather was found during the operative procedure and not caused by the operative procedure, is that right, Doctor?

THE WITNESS: That's true, yes, it was not caused

by the operation.

THE COURT: Now put your question.

Q Doctor, assuming that this scarring was present prior to this accident and the herniated disc was present prior to this accident, would a man be unaware of pain if he had the conditions that were shown on that operation?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHULTZ: If your Honor please, it incorporates two things, scarring and a herniated disc.

THE COURT: That's right, both of which have been testified to here.

MR. SCHULTZ: If your Honor please, that is not what the doctor testified to under cross.

THE COURT: I will allow the question.

MR. SCHULTZ: I respectfully object, your Honor.

A I can only answer it in this way, that the only way one can consider a patient as having a disc protrusion or scarring is by his clinical picture, not by seeing it on and X-ray or doing a routine study. On the basis of the history in this case of him having been symptom free, that is, not having symptoms reference to his back and nerve roots, and following this injury having progressive symptoms with the finding of scarring some six months later or seven months

gw/lf Kaplan-Redirect 470

later, whatever it was, I would say it must be considered as related to his injury. There is no evidence that it existed before.

Q What I am saying, Doctor, if it had existed before, wouldn't the man have been aware of it and complained about it before?

MR. SCHULTZ: Objection. When he says "it" what does he mean?

THE COURT: What you meant by your question.

MR. SCHULTZ: May I respectfully except.

THE COURT: You may.

A I would say he would have been aware of pain, not aware of adhesions or a disc protrusions, but he would have been aware of pain had he had this problem prior to an injury.

Q And the fact that there were no complaints of pain and no medical treatment prior to this accident, is that compelling proof to you that this accident was the cause of this injury?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, the history in this case is that this accident caused it.

Q Doctor, with regard to the problem of impotency, Mr.

Chiarello has testified here that he is able to attain an erection but that in the course of the sex act it is necessary for him to move and at that point his pain causes him to lose that erection.

In your opinion, Doctor, would that be a fair medical description of his condition?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, I would say that would be fair.

Q Doctor, this rhizotomy, is it an attempt to totally destroy certain nerve roots?

A Well, in some cases --

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A In some cases it is. In this case it is not because it's done as a percutaneous procedure. In some cases it's followed by total destruction but usually not.

Q Would you tell the jury how this procedure is done?

A Since I have never done it, I don't think my expertise really warrants that.

THE COURT: Then don't do it.

Q Fair enough, Doctor.

MR. LASSOFF: I have no further questions.

THE COURT: We will have a short recess.

(Recess)

(Jury present)

MR. LASSOFF: Mrs. Chiarello.

A N G E L A C H I A R E L L O, a plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

MR. LASSOFF: Before proceeding, your Honor, may I ask your Honor to take judicial notice of life expectancy table contained in the Civil Practice Law and Rules which shows that a man of the age of 39 has a present life expectancy of 32.7 years.

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. LASSOFF:

Q Mrs. Chiarello, on June 30, 1972, were you married to Thomas Chiarello and did you live with him and did he support you?

A Yes.

Q Can you tell me when and where you were married, Mrs. Chiarello?

A Married June 11, 1961, at Holy Ghost Church in Brooklyn, New York.

Q Prior to your marriage, Mrs. Chiarello, were you

employed?

A Yes, sir, I was.

Q Where were you employed?

A I was employed by American Stevedores.

Q Is that where you met Mr. Chiarello?

A Yes, sir.

Q After your marriage, did you ever work prior to this accident?

A No, sir.

Q Now, how many children do you have?

A I have three.

Q Would you give us their names and date of birth?

A Laura, she was born March 14, 1962; James, he was born March 11, 1963; and Tracy, she was born October 10, 1967.

Q Now, would you tell us about your relationship with your husband from 1961 until 1972, June 30th, the date of this accident?

A We had a very good relationship. We enjoyed being together, with the children as a family, we went on picnics and to baseball games, football games. We were involved in their sports activities. Occasionally we would go out with friends to a night club or out to dinner. We were sexually compatible. We enjoyed just being together.

Q What does sexual compatibility mean to you, Mrs. Chiarello?

A That we were able to perform sexually satisfactorily.

Q All right. Can you tell us, to the best of your recollection, with what frequency you and your husband engaged in marital intercourse prior to this accident?

A On occasion twice a week, sometimes three times a week, sometimes once a week, sometimes four times a week. It's hard to say.

Q Did there come a change, first of all, with regard to the other areas of your marriage excluding sex for the moment after this accident?

A Yes, sir.

Q Would you tell us about that, please?

A Well --

Q Would you keep your voice up, also?

A Yes. He was very depressed and irritable and didn't want to be bothered with anybody. He was in such pain that he just wanted to be left alone. And there were times where he became violent. And there are times he talked about killing himself.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Yes.

MR. SCHULTZ: Move to strike it.

THE COURT: Strike it.

Q When you say he became violent, what does that mean?

A I can tell you about one occasion. I had gotten my children a dog and I was working at the time --

MR. SCHULTZ: If your Honor please, may I respectfully except?

THE COURT: Sustained.

Q Mrs. Chiarello, without regard to specific instances, when you say he became violent, are you referring to temper or to physical acts of violence?

A Physical acts of violence.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Temper and physical acts of violence.

Q Did he ever strike you after this accident?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Can you tell me before this accident what, if any, activities did your husband participate in with your children?

A He was involved with my son's sports activities. He helped coach a baseball team and football team. He took them sleigh riding and he played ball with my children and their friends in the street. He took them fishing.

Q Besides playing with them in the course of these activities was he instructing them in these activities as well?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes. He taught my son everything he knows about sports, and my daughter, for that matter.

Q Prior to this accident, Mrs. Chiarello, what, if any, work did Mr. Chiarello do around the house?

A Prior to the accident?

Q I can't hear you.

A Prior to this accident?

Q Prior.

A Well, he painted and made any kind of repairs that had to be made in the house. If it snowed he shoveled the walk, took care of the swimming pool, mowed the lawn and anything that had to be done in the house he took care of. He helped wash the windows.

Q Following this accident did you have to assume any of the duties that Mr. Chiarello had done around the house prior to the accident?

A Yes, sir, all of them.

Q Can you tell me about your sex life with your husband since this accident?

A What do you mean by my sex life?

Q Well, first of all, have you and your husband tried to have marital relations since this accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A What is your explanation of marital relations?

Q Well, without going into that, first of all, have you tried?

A Yes, we have tried.

Q With what frequency have you tried, going back to 1972 now, to have marital relations with your husband?

A Once every two weeks, once a month.

Q At the present time are you still trying to have marital relations with your husband with that frequency?

A No, sir.

Q Can you tell me when was the last time that you and your husband tried to have marital relations?

A About four months ago or even longer.

Q When you and your husband tried to have marital relations, on each or any occasions since this accident has there ever been a time when you and he completed an act of marital relations?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, sir.

Q Can you tell me what, if any, effect this had on you during the first two years after the accident?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Well, at the beginning --

Q Keep your voice up.

A At the beginning I was very frustrated and irritable and nervous and very unhappy. Everything seemed to change, my whole life.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A And it got to the point where I realized that I had to adjust myself to the way things were or I would go out of my mind.

MR. SCHULTZ: Move to strike.

THE COURT: Overruled.

A And that I had to accept things the way they were.

Q Did you make that adjustment?

A Yes, sir, I had to.

Q Will you tell me approximately when you made that adjustment?

A About seven months ago.

Q At the present time what, if any, effect has -- does

the fact you and your husband no longer can engage in one of the activities of married life, sexual intercourse, have any effect on you?

A I am sorry.

Q At the present time and for the last seven months since you have made this adjustment, has the fact you and your husband can no longer engage in one of the activities of married life, sexual intercourse, have any effect on you?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, it does have an effect.

Q What is the effect?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Well, it puts a big strain. There is something missing. He feels less of a man.

Q I am asking about how you feel.

MR. SCHULTZ: Move to strike.

THE COURT: Overruled.

A I have a big void in our marriage.

Q Have you accepted the fact that you and your husband will no longer have that part of your married life again?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, I have.

Q Mrs. Chiarello, after this accident, in addition to the work around the house that you have had to undertake, have you had to undertake other activities with your children that you didn't before?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I have to take them to all their sports activites, they come to me for things they would normally go to their father for.

Q Was there a change that you observed in the relationship between your children and their father after this accident?

A Yes.

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Mrs. Chiarello, after this accident, how did your husband get to the various doctors and hospitals that he went to?

A I took him and on some occasions my father or his father.

Q After this accident, Mrs. Chiarello, did you go to work?

A Yes, sir.

gw/lf Chiarello-Direct 481

Q When did you go to work?

A June, 1974.

Q And who did you go to work for?

A From June of 1974 to June of 1975 I worked for the Coral Springs Health Center, which is a group of doctors, and from June of 1975 to November of 1975 I worked for Dr. Kramer.

Q Are you saying from June of '74 to June of '75 you worked for this group of doctors?

A Group of doctors.

Q And June of '75 to November you worked for a Dr. Kramer?

A Right.

Q Incidentally, while you were working, were you working full time or part time?

A The job at the health center I was working part time. I worked three days a week. When I worked for Dr. Kramer I worked full time.

Q Did there come a time when you had to leave this job?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Yes, sir.

Q And was this due to any disability --

THE COURT: Ask her why.

Q Why did you leave the job?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I left the job because one afternoon I had called home to tell my son I would be late and that he should make arrangements with a friend's parents to take him to football practice. While I was talking to him he kept saying, "Mom, when are you coming home?"

MR. SCHULTZ: Move to strike it, your Honor.

THE COURT: Overruled.

A When I got home--I had to rush him off the phone because the phones were ringing in the office. When I got home I found my two daughters sitting on the sofa, both of them crying. I asked them what had happened. Nobody answered.

MR. SCHULTZ: Move to strike it, your Honor.

THE COURT: Overruled.

A I went into the bedroom and Tommy was laying in bed and he was crying. When I got him calmed down he explained --

MR. SCHULTZ: Objection, your Honor.

THE COURT: I will have to strike it. It is hearsay.

Q Mrs. Chiarello, did you find out what had happened?

A Yes, sir.

Q What had happened?

MR. SCHULTZ: Objection.

THE COURT: She found out through hearsay. Objection sustained.

Q Mrs. Chiarello, prior to coming here in January, at my request did you go see Dr. Gervin?

A Yes, sir.

Q And for what purpose did you go see Dr. Gervin?

MR. SCHULTZ: Objection.

THE COURT: I don't know what this has to do with this lawsuit.

MR. LASSOFF: It's an explanation of why Dr. Gervin isn't here, your Honor.

THE COURT: You may. I will take it.

Q To make it simple, did you ask Dr. Gervin to come to New York and testify on your husband's behalf?

A Yes, I did.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q What did he say?

THE COURT: Overruled.

A He said he does not testify and he just does not have the time.

Q In March or late February, at my request did you again go to Dr. Gervin?

A Yes, I did.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q Did you again ask him to come to New York to testify on your husband's behalf?

A Yes, I did.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q Was his response the same?

A Yes, it was.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

MR. LASSOFF: Your Honor, at this point I request your Honor to take judicial notice of rule 45 of the federal rules --

THE COURT: I don't have to take judicial notice of the rules of evidence or the rules of practice.

MR. LASSOFF: I don't know if I have to ask your Honor to do this but would your Honor note the State of Florida --

THE COURT: We have a procedure called requests to charge.

MR. LASSOFF: I have no further questions.

THE COURT: You may cross examine.

MR. SCHULTZ: No questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: I suggest we adjourn for lunch now and return a quarter to two.

MR. SCHULTZ: If your Honor please, is it possible to have it at two. I have people coming in.

THE COURT: Two o'clock, all right.

(Luncheon Recess)

llo vs. 1
co
. 2962 2
. 1956
Metzner 3

gw/lf

AFTERNOON SESSION

March 8, 1976
2:10 p.m.

(Jury present)

MR. LASSOFF: Your Honor, before the plaintiff rests, may I put Mrs. Chiarello on for one question I forgot to ask her. I forgot to ask her how old she is.

THE COURT: Stipulate.

MR. LASSOFF: Will you stipulate she is going to be 33 years this year?

MR. SCHULTZ: Of course.

MR. LASSOFF: Thank you.

Plaintiff rests.

THE COURT: May I see counsel at the Bench.

(At the side bar)

THE COURT: Do you want to withhold your motions or do you want to make them for the record now?

MR. SCHULTZ: I would just as soon withhold them, Judge. Frankly, I thought, when we terminated at 12:30 that that is what we were going to do is make the motion at that point. That is what I thought was going to happen. I knew he was going to rest.

THE COURT: He tells me now with the jury back in the box after lunch. Why didn't you do it when we finished?

MR. LASSOFF: I sort of thought I had indicated it. I thought your Honor didn't want to proceed with this case.

THE COURT: It was only 12:30. I had plenty of time.

You want to go in there and put it on the record or reserve it until the end of the trial?

MR. SCHULTZ: I will reserve them for the end of the trial because I have people here.

THE COURT: That is what I thought.

(In open court)

THE COURT: You may proceed.

MR. SCHULTZ: Dr. Gould, please.

E D W A R D M. G O U L D, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. SCHULTZ:

Q Dr. Gould, I am going to keep my voice up so you can hear me.

A Please.

Q If you don't, would you let me know? If you don't hear me, would you let me know?

A I will raise the decibels.

Q All right. Doctor, are you a doctor licensed to

practice in the State of New York?

A I am.

Q Doctor, how old are you?

A Am I under oath?

THE COURT: Yes.

Q Yes, sir.

A 74.

Q Doctor, how long have you been licensed to practice medicine in the State of New York?

A Since 1925.

Q Doctor, would you be good enough to tell us, if you will, please, what schools you attended?

A I am a graduate of the Yale School of Medicine in 1924.

Q What hospitals are you associated with, please?

A At the present time I am consulting neuropsychiatrist to St. John's in Queens, the Queens General Hospital, Peninsular General Hospital, Southshore Hospital and the Long Beach Memorial Hospital.

Q What hospitals had you been associated with, would you be good enough to tell us?

A Well, I was associated with the New York Neurological Institute where I took my residency, part of the Columbia Presbyterian Medical Center, and over the years I was at

Lenox Hill, Polyclinic, Sydenham, City Hospital of New York.

Q Doctor, do you have any special qualifications or specialties, please?

A I have specialized in neurology and psychiatry since I got out into practice, I have a diplomate in neurology and I am a state qualified psychiatrist.

Q Doctor, would you tell us how one becomes a diplomate?

A Since 1940.

Q You have been a diplomate since 1940. How does one become a diplomate, Doctor?

A You apply to the board, send in your qualifications, they check your qualifications, they check your background, and then you go down and take an examination. I think in my time they were oral. Now I understand they give you written also. If you pass, you become certified.

Q Doctor, were you certified as a diplomate in neurology?

A Yes, sir.

Q Would you please be good enough to tell the Court and jury what the specialty of neurology involves?

A Neurology is practicing a regular medical process except you have emphasis on the brain, spinal cord and the nerves and the reactions of the body to certain stimuli.

Q Now, Doctor, did you examine Mr. Thomas Chiarello?

A I did.

Q Would you be good enough, sir, to tell me when you examined him?

A On January 12, 1976.

Q I take it, Doctor, that the purpose of your examination was that of a neurological examination?

A That's correct.

Q And that's within the field of your specialty, is it not, sir?

A That's right.

Q Doctor, would you be good enough to tell me, did you -- withdrawn.

Would you tell this Court and jury how you examined this gentleman?

A First of all, I reviewed --

Q -- and give us your findings and as we go along I will ask you to explain them.

A On examination, the head was perfectly normal, well shaped, his pupils were equal, the eye movements were normal, his hearing was intact, his facial motions and protrusion of the tongue were perfectly even, his neck was free of any tenderness, spasm or restriction of motion, the extremities were essentially negative -- that is, the arms were essentially

negative as to power and reflexes, although there was a slight weakness of the right hand in his grip. The sensory examination of the right upper extremity showed a lack of pin perception in the upper outer arm, the forearm and the back of the hand, whereas the palm of the hand was perfectly sensitive to the pinprick.

Q Doctor, would you please tell us what significance or what did you determine as a result of that sensory examination of this man's right arm?

A Well, the right arm, the sensory defect in that right arm, was not based on any what we call anatomical pathway. In other words, if you know, for instance, the structure of wiring for a certain house, you know if a fuse blows out which rooms are going to be dark and if a fuse blows out in the living room and the light goes out in the back bedroom, then if you know they are not on the same circuit you are suspicious why the light went out, there is something wrong anatomically. The same thing here. If you know the structure of the nerves in the upper extremity and the defects don't correspond to what you know the anatomy is, then you know it's not accurate.

Q Doctor, do the nerves that supply the upper -- are the nerves that supply the upper portion of the arm the same as those that supply the palm of the hand?

A Not quite. There are two nerves -- well, there are three nerves that supply the forearm and the hand. The one nerve supplies only sensory impulses in the hand, but two other supply the front and the back of the hand in certain areas.

Q Now, Doctor, did you find that he had sensory -- a claim of lack of sensory perception on his outer aspect of his arm?

MR. LASSOFF: If your Honor please, may we have the witness stop being led at this point?

Q What did you find with regard to sensory perception on the outer arm?

A He claimed to have no sensory pinprick perception of the back of the hand and of the four fingers. He could perceive on the back of the thumb.

Q What did you find with relation to his palm?

A The palm he could perceive all sensations, in the palm of the hand.

Q What did this indicate to you?

A It indicated to me it is not anatomical, it does not fit into the structural picture of the upper extremity.

Q All right, Doctor. Now, Doctor, with relation to his upper extremities, in other words, his arms, did you find any atrophy or shrinking of the muscles in his arms and

fingers?

A No significant atrophy of the arms or of the hand or the fingers.

Q Did you find any nerve involvement in his hand or his fingers?

A No organic nerve involvement.

Q And, Doctor, did you observe whether this man was using a cane?

A Yes, he used a cane, yes.

Q In which hand was he carrying the cane?

A In his right hand.

Q Doctor, did you form an opinion with reasonable medical certainty as to his complaints of weakness in the right hand and the use of the cane?

A Well, I wasn't too impressed with his weakness and it couldn't have been very marked because of his weight. If he carried a cane in the right hand, if it was actually weak he would collapse on that side.

Q All right, Doctor.

Doctor, did you then examine his back?

A I did.

Q Would you tell the Court and jury what examination you conducted and what tests, if any, you conducted with relation to his back?

A Well, an examination of his back, there was an operative scar, he complained of tenderness in his back, he had difficulty in bending beyond a very small sphere, he couldn't hyperextend, bend backwards, because of his alleged pain.

The interesting thing is he had a sensory defect in the right side of his lower back and lower trunk which went into the hip and down the right thigh, which again was not anatomical.

Q Doctor, when you say he had a defect, in other words, he reported to you that he had a lack of sensation, is that correct?

A That's correct.

Q And he reported to you, Doctor, that this lack of sensation I think you just told us was on the trunk?

A On the back, the trunk and back, or the flank, if you want to call it.

Q Where else?

A Also in the right thigh, right lateral aspect of the leg and some in the foot also. Let me check that once more.

Yes, he had a sensory defect in the right foot on the lateral aspect of the leg.

THE COURT: What is a lateral aspect?

THE WITNESS: The outer.

THE COURT: Go ahead.

Q In other words, Doctor, would you tell this Court and jury how that test is performed?

A It's a very simple test. With a pin.

Q What do you do? Do you touch him with this pin?

A You touch him all around the various areas with the pin?

Q And you ask him to do what?

A "Do you feel it? Is it stronger here than the other place?"

Q Did he report to you this lack of sensation in these areas?

A Yes, sir.

Q Doctor, that report of the lack of sensation, did that follow the nerve distribution pattern?

A No.

Q Sir?

A In the leg and foot on the lateral aspect it could be anatomical. However, in the thigh and in the hip and in the flank there is no question but that it's not anatomical.

Q In other words, by nonanatomical it doesn't follow the distribution of the nerves, is that correct?

A It doesn't fit into the pattern of the nerve supply

of those areas.

Q Now, Doctor, did you do a knee jerk test on this gentleman?

A I did a knee jerk, and it was good on the right, a little bit sluggish on the left, which I didn't feel was significant of anything here.

Q Doctor, you say that the knee jerk was good on the right?

A Yes.

Q Doctor, do you know that the operative procedure involved the nerve root at L4 and L5 on the right?

A On the right?

Q Yes.

A Well, that wouldn't interfere. It would have no relationship to the knee jerk.

Q In other words, Doctor, the knee jerks absolutely had nothing to do with this operative site, isn't that true?

A That's correct.

Q The nerves that control the knee jerks came from a higher position than the L4-L5, is that correct?

A That's right.

MR. LASSOFF: If your Honor please --

THE COURT: He is your witness, he is a witness. Let him answer.

Q Doctor, do the nerves that control the knee jerks come from a place higher than L4 and L5?

A They do.

Q Doctor, did you do an ankle jerk test on this man?

A I did.

Q What did you find?

A It was absent on both sides.

Q Did the absence of ankle jerks on both sides indicate anything to you whatsoever?

A This is not specific for any particular condition. If he had a lost ankle jerk on the right alone, then you would have to attribute that to the surgery he had undergone. When both are absent, then you can't have any explanation.

Q Doctor, what did you find with relation to his station?

A To what, his station?

Q Station.

A It was steady. He was able to stand with his eyes closed.

Q Is that a neurological test?

A Yes, sir.

Q Is that known as the Romberg?

A Romberg test.

Q Doctor, you didn't find any significance in that,

did you?

A Well, there was no reason why he should have an unsteady station from the illness that he had originally.

Q Doctor, did you do a Lasegue test on that gentleman?

A I did a Lasegue test and he said it was uncomfortable and I didn't pursue it.

Q And did you do a Patrick test?

A I did the Patrick test, which he also said was uncomfortable.

Q Now, Doctor, do you have an opinion as to whether or not this man had any neurological involvement at the time that you examined him?

A The only opinion I can have is that he could have an organic structural involvement of the lateral aspect of the leg and the foot. However, in view of the other losses of sensation, it is hard to estimate even that.

Q Doctor, is this man capable, in your opinion, with reasonable medical certainty of walking without a cane?

A I think he could be able to, yes, sir.

Q Doctor, did you find any defect in the muscles of his lower appendages, in other words, his legs?

A No, no neurological defect. I didn't measure the legs but I understand they were within normal limits.

Q Doctor, did you find any impairment that would pre-

vent him from walking?

A No. He was able to walk well although dramatically with the use of a cane, but he could walk and get around.

Q Doctor, do you have an opinion as to whether or not this man is capable of working -- withdrawn.

Doctor, can this man work as a stevedore?

A I would say no, not at this time, anyhow.

Q Doctor, do you have an opinion as to whether or not this gentleman can do office work?

A Yes, he seemed to have a very good intellect and I see no reason why he couldn't do it.

Q Doctor, in your opinion, is this man capable of doing work that does not involve physical activity?

A Yes.

Q Doctor, you were questioned with relation to Mr. Chiarello at a prior occasion, were you not?

A What's that, sir?

Q You were questioned with relation to Mr. Chiarello on a prior occasion, were you not?

A I was.

Q And, Doctor, did you render a report to me pertaining to this?

A I rendered a report --

Q On your examination?

A Yes.

Q Doctor, did vou find -- first of all, Doctor, what is psychogenic?

A Psychogenic is a process where a condition arises in the mind of the individual, some is conscious, some is partly unconscious, some is completely unconscious.

Q Doctor, did you find --

MR. LASSOFF: Objection to the form of the question already, your Honor, before we go further.

THE COURT: Ask him what he found.

Q What did you find in relation to his sensory claims, Doctor?

MR. LASSOFF: Objection, your Honor. He has already testified to the sensory claims.

THE COURT: I don't know.

Q What did you find with relation to this gentleman's sensory claims?

A The sensory findings in the upper extremity were not organic in nature. The sensory findings in the lower back, the flank, the hip and the thigh were not organic in nature. The sensory changes in the leg and foot may be organic as a result of the surgery that he underwent.

Q Did you reach any conclusions as to his claims or these lack of sensory claims that he made?

A Did I reach any conclusions?

Q Yes.

A This is a psychogenic thing which is very common and it is not disabling in itself.

MR. SCHULTZ: You may examine, sir.

Q Incidentally, Doctor, before I do, you have examined litigants in my behalf, have you not, in the past?

A Not that I recall. I will take your word for it, though.

Q I don't recall either, but I just want to know if you did.

A I don't recall, sir.

Q Other than this gentleman?

A No, I had one I think assigned from your office about a year ago and I never got around to examining him.

MR. SCHULTZ: You may examine, sir.

CROSS EXAMINATION

BY MR. LASSOFF:

Q Doctor, you examined Mr. Chiarello on behalf of the defendants in this action, is that correct?

A That's correct.

Q And do you recollect calling me sometime prior to January 12, 1976, the date of your examination, to set up your examination?

A That's correct.

Q And we had about a half hour conversation, if I am not mistaken.

A I didn't know it was that long, but it was very pleasant and explicit.

Q We were trying to set up a date because of the shortness of time where you could see the man?

A I don't remember. When I spoke to you?

Q Yes. You wanted him to come out to Woodmere?

A I don't recall the exact date. It was three or four days before at the most.

Q Okay.

MR. SCHULTZ: Wait a minute, if your Honor please.

MR. LASSOFF: Before is something we are not permitted to go into.

THE COURT: I am not interested in what he is going to say after that. It is not pertinent to this trial. Go ahead, Mr. Lassoff.

MR. SCHULTZ: If your Honor please, may I respectfully request that Mr. Lassoff not stop the doctor.

THE COURT: I think he did in this case at an appropriate time.

Go ahead, Mr. Lassoff.

Q All right, Doctor. At the time I spoke to you, did

I advise you that the plaintiff had been examined that week by Dr. Lawrence Kaplan?

A That's correct.

Q And did you ask me for a copy of Dr. Kaplan's report?

A I did, and you said you hadn't received it yourself.

Q Now, Doctor, when I sent Mr. Chiarello to your office in Manhattan, I believe, I sent certain documents with him, did I not?

A You sent what?

Q Certain documents with him.

A That's correct.

Q And Mr. and Mrs. Chiarello arrived at your office by themselves, I wasn't there and no lawyer from my office was there?

A That's correct.

Q Doctor, would you tell us what documents you had at the time of your examination?

A I have a letter dated January 5, 1976, from your office to Dr. Arthur Friedman.

Q Does that letter contain a list of all the injuries Mr. Chiarello --

MR. SCHULTZ: Objection.

THE COURT: I don't hear you. Overruled. He is cross

examining.

MR. SCHULTZ: If your Honor please, he is talking about a letter. He is asking him does it have certain information in it.

THE COURT: Obviously it is proper to find out what the doctor had before him when he conducted his examination.

MR. SCHULTZ: I respectfully except, your Honor.

Q Did that letter contain all of the plaintiff's claims of injury in this action?

MR. SCHULTZ: Objection, your Honor.

THE COURT: He doesn't know that. He knows the claims that are in the letter.

Q Was there a detailed itemization of the plaintiff's claims in that letter that was sent to you?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. What difference does it make?

Q What did you get besides the letter?

A A report from Dr. Stephen Gervin as to a neurological examination -- I am trying to find the date -- October 1, 1973.

Q Were you furnished at that examination with a copy of the Golden Isles Hospital record?

A Yes, there was a discharge summary which was prepared in December of '73.

Q Were you furnished at that examination with a copy of the operative report of the operation performed in December, 1973, at the Golden Isles Hospital?

A Well, I have a pathological report of the tissue removed, I have an anesthesia report which is a useless copy, and I had a subsequent neurological evaluation by Dr. Gervin and some subsequent reports by him postoperatively, more reports by him, more reports by him.

Q Are the reports that you have from him part of the hospital record?

A What's that, sir?

MR. SCHULTZ: Objection.

THE COURT: That wasn't your question. The question was does he have the operative report.

Q Do you have the operative report, Doctor?

A Let me see if I have it. If I recall, I did not have a satisfactory operative report. I want to see if I had anywhere it was just a poor copy. I have it here.

Q You do have?

A Preoperative and postoperative diagnosis, operation performed -- no, this was for the rhizotomies.

Q Doctor, if the operative report at the time this herniated disc at L4-L5 was excised indicated the presence of marked adherent scarring, would that be of significance

BEST COPY AVAILABLE

to you as a neurologist?

A Yes, he could have scarring.

Q I am not asking you what he could have. I said if it indicated that, if the surgeon put that in the operative report, is that significant?

Here is the operative report. There it is (handing). Would you read that for a moment?

A The copy that I got was useless.

Q Read that and see if you can answer my question.

(Pause)

A Yes, sir.

Q What significance would that have to you as a neurologist?

A What?

Q What significance would that have to you as a neurologist?

A He had surgery performed, that there was herniation of the disc and that there were adhesions in the area of the two nerves.

Q And what are adhesions, Doctor?

A What's that?

Q What are adhesions?

A Sticking of tissue in places where it doesn't belong. It adheres.

Q What caused the adhesions in this case, Doctor?

A I don't know.

Q Wouldn't it be caused by bleeding at the time of this herniated --

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not necessarily. It might, but not specifically.

Q It might?

A It might but not specifically.

Q When you have bleeding inside the spinal canal, Doctor, does that cause scarring?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Not necessarily. You can have a patient who has a bad hemorrhage with a lot of blood in the spinal fluid and not have residual scarring.

Q Can it cause scarring?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A It can, but I don't know what the mechanism would be in this instance.

Q You don't know what the mechanism would be.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q Doctor, what do the words "marked epidural scarring" mean to you as a neurologist?

A It didn't say whether the epidural scarring was on the outside or the inside.

Q On the outside or inside of what?

A Outside of the dura. The dura is a membrane that covers the spinal cord and there is an underlying other membrane, the arachnoid. Now, the marked epidural scarring, I don't know whether it is on the outside of the dura or inside of the dura.

Q Doctor, would it be significant that in the course of trying to correct the scarring the dural sleeve was cut?

A Not necessarily. It may happen. They can have a slip of the knife.

Q Wouldn't that indicate to you that this was inside the dura, the scarring, if the dural sleeve was cut?

A That is not specific, though, sir.

Q What is the effect of marked epidural scarring on a person?

A It may not have any effect because the spinal cord is still guarded by another membrane beneath that and a membrane that surrounds the spinal cord, so that epidural scarring in itself is not indicative of having pathology in the spinal cord itself. It may involve the roots but not

the spinal cord.

Q What is the effect of epidural scarring on the nerve root at L4 and L5?

A If you have scarring around the nerve root you can have impaired sensation and impaired function.

Q How about pain?

A You can have pain also.

Q What kind of pain?

A What we call root pain.

Q And how bad is root pain?

A I don't know if he was -- he was complaining of back pain but I don't know if he was complaining specifically of root pain.

Q Doctor, would you do an operation called a rhizotomy unless there was this complaint of root pain?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Well, they did the rhizotomy because there was a complaint of excessive pain.

Q Nerve root pain?

A That's correct.

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q Is that right?

gw/lf Gould-Cros 510

A That's what I understand from the record.

Q And the rhizotomy was to destroy part of the nerve roots?

A To destroy part or make it impervious to sensation, not necessarily to destroy it.

Q How do you make it impervious to sensation?

A How is that?

Q How do you make it impervious to sensation?

A If you temporarily irritate the root just as if you wake up with your hand asleep, you don't have any sensation for awhile, and then as it limbers up the sensation returns. So maybe this is a temporary procedure.

Q Is this operation meant to be a temporary procedure?

A They certainly don't want to destroy the nerve roots because then they would really leave the patient in a very bad shape if they actually destroy the roots.

Q Would they perform this type of an operation unless the man was in chronic intractable pain, Doctor?

MR. SCHULTZ: Objection.

THE COURT: According to his complaints he was and they performed it and they got relief from it.

Q And now long did that relief last, Doctor?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A He claimed that he had to have the -- no, that was the conductor. I don't know how long it didn't last, but I know it wears off after awhile so they didn't destroy the roots.

Q Do not nerves regenerate, Doctor?

A They don't generate very well down there in that area. Peripheral nerves will regenerate but in the spinal roots they don't do very well.

Q Doctor, you just mentioned something that occurred previous to the rhizotomy. You mentioned a machine, a transcutaneous nerve stimulator.

A What about it?

Q Prior to the rhizotomy, was this man supplied with such a machine in an effort to alleviate his pain?

A He was.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

Q And what was the purpose for that machine, Doctor?

A Also to give him a sort of counterirritant to remove the sensation of pain.

Q Have you ever seen any of the myelograms in this accident, Doctor?

A In this instance?

Q In this accident, any of them? There were three

taken. You know that?

A I didn't get that point.

MR. LASSOFF: I withdraw the question.

Q Doctor, you were aware that there were three separate myelograms of the lumbar spine performed?

A I believe so, one in Virginia and two down south.

Q And there was also a myelogram performed on the cervical spine, is that correct?

A This I don't recall specifically, but if you say so I will take your word for it.

Q And there was also an electromyogram of the cervical spine, is that correct?

A This I don't recall.

Q What I am asking you, Doctor, is have you seen any of the myelograms that were performed on Mr. Chiarello?

A No, I haven't.

Q Would it help you in answering these questions to examine these myelograms?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I would prefer to defer to the individuals who do the myelogram.

Q Then you would accept their readings on these myelograms is that correct?

A I say I would defer to them. I may not accept them but I would defer to their opinion.

Q If you don't accept it why don't you look at them and tell us whether you accept them or not?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Would you accept Dr. Kaplan's readings of myelograms?

A I would agree with him.

Q You would agree with what he says?

A I think so.

Q Would you agree with what Dr. Kaplan said, that the pain caused by this scarring of the L4-- at the nerve root between L4 and L5 is the worst pain the body can produce except for a precardial heart attack?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A With the exception of what?

Q A precardial heart attack, the binding pain about the chest prior to a heart attack.

MR. SCHULTZ: Objection.

THE COURT: He didn't say anything about a binding pain.

MR. LASSOFF: I am just adding it.

THE COURT: I know you are adding it. That is why

he is objecting.

Q A precardial attack.

A I would say a pain of a ventricular nerve is far more painful.

Q Anything else?

A What's that?

Q Anything else?

MR. SCHULTZ: Objection. I don't know what he means by anything else.

THE COURT: With regard to other instances, is there any pain --

A With a coronary you can have severe pain.

Q We already discussed the coronary.

A I don't know whether you can compare one with the other.

Q Comparing them only as to severity of pain, Doctor.

A That is hard to estimate.

Q Incidentally, you are not an internist specializing in heart attacks or diseases of the heart, are you?

A I don't get you.

MR. LASSOFF: Withdraw the question.

Q Doctor, when you say something is psychogenic, that doesn't mean that the man doesn't feel the pain, does it, Doctor?

MR. SCHULTZ: Objection.

A He can feel pain.

THE COURT: Overruled.

A He can feel pain, yes.

Q And, incidentally, where a man --

A If you face me I can hear you.

Q I will try to keep facing you. I do have the habit of walking around.

Where a man has undergone the procedures that Mr. Chiarello has undergone, a hemi-laminectomy and a rhizotomy, would those be competent producing causes for pain?

A Yes, they could.

Q And when you have pain of the type that is created by those causes, could that produce a psychogenic overlay?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not of the type that I saw in this individual.

Q In other words, you are saying that an action of the mind could not be produced by the injury that Mr. Chiarello sustained in this accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A He could be having various -- an individual can have various psychogenic reactions to pain. However, the ones

that I found present are not the type that are produced by spinal root involvement.

Q Organically?

A What's that?

THE COURT: I don't understand your question.

Q You are saying that the type you found present are not the type that would be produced organically?

A That's correct.

Q But I am asking you about psychogenically.

A Even to produce psychogenically, they are not disabling. He has no disability of the use of the right upper extremity, he has no disability of the use of the right thigh. Therefore, the sensory impairment that's there is not disabling. Even if you concede that it's purely psychogenic.

Q We are not claiming, Doctor, that that is what is disabling him. What we are asking is if the injuries he sustained in this accident could produce an effect on his mind that made him think that these areas are bothering him as well.

A No.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

A That doesn't work this way.

THE COURT: Sustained. That is not what he claimed.

MR. LASSOFF: That's true.

Q Doctor, did you receive complaints of impotency?

A I think there was some mention of that. I don't recall specifically.

Q You do have a report, Doctor, do you not?

A That could be psychogenic in relation to his pain.

Q In other words, where a man is in extreme pain at the area of L4-L5, the attempting of a sex act itself can create so much pain as to interfere with the act?

MR. SCHULTZ: Objection, your Honor, as to form.

THE COURT: Overruled.

Q Is that correct?

A Look, if he has back pain it may interfere with the sexual life when he has the pain.

Q Doctor, you have read the operative report showing --

A I don't hear you.

Q -- marked adherent scarring. Would that not, in fact, produce marked back pain?

A The scarring?

Q Yes.

A It might.

Q And incidentally, does that scarring impinge upon the nerve roots?

A It can impinge upon the nerve roots if it's there.

Q Would nerve root --

MR. SCHULTZ: Would you let the doctor finish, please.

A Just a minute now. You see, if he's got scarring and he has pain, you wouldn't expect him to have the pain all on one side. You wouldn't scar just one side of the cord. You would have it bilaterally or mixed.

THE COURT: Wait a second, Doctor, You keep using the word "cord."

I gather the claim is scarring on the nerve root, not on the **cord.** Is there a difference between the two?

THE WITNESS: Let's put it this way. The cord is the main cable. The nerve roots are the offshoots of the main cable at each stage of the intervertebral space. So that if you are going to have scarring, you wouldn't have it just, I imagine, on one side out of the clear sky, it would be more diffused and you would have pain on both sides, but his pain has been listed as occurring on the right side and down the right leg.

Q Doctor, aren't there positive neurological findings on the left side as well?

A He had the sluggish knee jerk on the left.

Q And an absent ankle jerk.

A But that doesn't account -- he doesn't have any pain in those areas.

Q Doctor, can you tell me what part of this disc was removed?

A I imagine it was the posterior --

Q I am not interested in what you imagine, Doctor. I am interested in what you know.

MR. SCHULTZ: Objection.

THE COURT: Why?

MR. SCHULTZ: He is arguing with the witness.

THE COURT: He is not arguing with the witness. The witness said he imagines and he was possibly asked by Mr. Lassoff, "I don't care what you imagine."

The hospital record shows what was operated on as a fact.

A It must have been taken out of the right posterior aspect because that was the only side that was opened.

Q You mean they didn't remove the entire lamina?

A No, just a hemi-laminectomy.

Q Doctor, if I told you that all or nearly all of the disc was removed, would that have an effect on your opinion?

A All of the disc?

Q Yes.

gw/lf Gould-Cross 520

THE COURT: Or nearly all of it.

A Not necessarily.

Q Didn't you just say that the reason he wouldn't have pain on the left is they only took out the right side of the disc?

MR. SCHULTZ: Objection. That is not what he said, your Honor.

THE COURT: Sustained.

A They could take out much more of the disc with the hemi-laminectomy than the right side.

Q What does excision of the disc mean?

A It means you open the membrane and if the disc has popped out you shell it off.

Q What does shell it off mean?

A The best definition I can tell you is of certain types of operations that have a nubbin sticking out of the top end of it and you remove that nubbin.

Q Can you tell us with reference to the disc and not an orange?

THE COURT: I don't know what you want along that line. The doctor says according to the operative report they could have taken out all or most of it even though he went through a hemi-laminectomy.

MR. LASSOFF: I thought he denied that.

THE COURT: No, he did not deny that.

Q Doctor, assuming for the moment that the scarring that is listed in the surgical report is there --

A Wait a minute. Let me get that.

Q We are referring to the operation, the laminectomy or the hemi-laminectomy that was performed in December of 1973.

A Right.

Q And assuming that the surgical report is correct and there is marked adherent scarring and fraying of nerve tissue, what, if anything, can be done to correct that situation?

A What did you say, what kind of nerve tissue, frayed?

Q Marked adherent scarring and frayed nerve tissue.

A I don't know what you mean by frayed nerve tissue.

Q Doctor, would you look at the operative report and tell us with specific reference to the word "frayed" what does it say?

A I don't know whether the nerve root was frayed unless from the surgical procedure. It may have been the tissues around the nerve.

Q What does it say, Doctor?

THE COURT: Read what it says, Doctor.

A It says, "The nerve root was seen to be markedly

adherent with scar and frayed."

Q What does that mean?

A It may mean the scar that was frayed. Nerves don't get frayed like that.

Q The scar was frayed?

A The scar tissue may have been frayed.

Q What do you do about that? What can you do to correct that condition?

A You may try to clean it out. They did some cleaning out there.

Q Well, assuming that it's still there, there is still scarring there, what do you do?

MR. SCHULTZ: Objection, your Honor.

A You can't do anything specifically.

THE COURT: Overruled.

Q I didn't hear your answer?

A What's that?

Q What is your answer?

A They clean it out as well as they can.

Q Assuming you closed the man up and there is still pain there and the pain comes from the scarring, what do you do?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A You do what they did here. They did another myelogram, they did a rhizotomy.

Q What was the purpose of the rhizotomy?

A To relieve pain.

Q And is that a radical procedure to relieve pain?

A It is not an everyday procedure that you want to undergo.

Q In terms of medicine, is it a type common, and neither is a laminectomy, is a rhizotomy more radical than a laminectomy?

A It is an entirely different procedure.

Q Doctor, if a rhizotomy is performed, is that an attempt to destroy or deaden parts of the nerve roots?

MR. SCHULTZ: Objection.

THE COURT: We have gone through that.

Q Incidentally, a myelogram was taken as recently as July 28, 1975, and that myelogram has been read by Dr. Kaplan as showing a defect at the same level, L4-L5, which Dr. Kaplan stated was probably due to scar tissue as well as possibly a repeated herniated disc.

Would you agree with Dr. Kaplan?

A I would say that it's a possibility.

Q Doctor, I want you to assume for argument's sake that on June 30, 1972, my client, Mr. Chiarello, a man with

no history of prior injury or accident, while sitting in his car stopped on the Bayonne Bridge was struck in the rear by a bus with enough force to throw him backwards and snap the front seat, the driver's seat of his car, so that he fell flat on his back and then propelled the car forward into the car in front and when the car he was in struck the car in front he was propelled upward again, being draped over the steering wheel, that he was seen by a Dr. L. Jackson Spitz, who found a low back derangement and acute torticollis on July 3rd of 1972, that he was treated by various other doctors until January of 1973, when a myelogram was performed at the Richmond Memorial Hospital in Richmond, Virginia, which myelogram was read as showing a herniated disc at L4-L5.

Doctor, in your opinion, with reasonable medical certainty, was this accident a competent producing cause of these injuries?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

THE WITNESS: What's that?

THE COURT: I sustained the objection.

Q Doctor, can you think of any surgical procedure that would alleviate Mr. Chiarello's pain if it is due to scar tissue on the nerve roots at L4-L5?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I don't know of any right now.

Q Is it a fact, Doctor, that any surgical procedure such as a spinal fusion or an exploration or excision of a disc would create more scar tissue?

A Well, we don't know that there is a disc right now.

Q If there was a disc and if there was scar tissue there and you went in to remove it, would that in and of i self create more scar tissue?

A Theoretically, yes. Actually, I can't say.

Q Incidentally, Doctor, do you do this type of surgery?

A What's that?

Q Do you do this type of surgery?

A Not these days.

Q How long has it been since you have done any of this?

A About 45 years.

Q How long?

A 45.

Q About 45 years.

MR. LASSOFF: Thank you, Doctor.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. SCHULTZ:

Q Doctor, I believe you told us that part of this gentleman's neurological findings that you saw were psychogenic, is that correct?

A That's correct.

Q By psychogenic you mean that it was in his mind as opposed to organic, is that correct?

A That's correct.

Q Doctor, did you have an opinion as to what would happen -- withdrawn.

Do you have an opinion as to what will happen to those psychogenic complaints after this litigation is terminated?

A The psychogenic losses will shift very often. You get them in a patient on one side one day and the following day you see him he has them on the other side. Almost anything will change it or cause it to disappear. However, even during its presence, as I said before, it's not disabling.

MR. SCHULTZ: No further questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: You mentioned Friday, Mr. Schultz, you wanted to comment on the failure of the plaintiff to

call Dr. Gervin. As I gather it, Dr. Gervin is not subject to subpoena nor is he under control of the plaintiff. Consequently, if you were to comment on it I would have to tell the jury that he was equally unavailable to both sides and they can draw no inference. I think you ought to know that before you make any comment on his failure to call Dr. Gervin.

MR. SCHULTZ: They produced Dr. Leone who is not subject to subpoena.

THE COURT: He came voluntarily. Gervin is not subject to subpoena and because he happens to be a doctor he is not under what we call control of a party. If he is not under control, he is not subject to subpoena, he is unavailable to that party unless he will come voluntarily.

MR. SCHULTZ: My problem with that, Judge, and I respectfully take exception to what you said, I know that defendant's doctors who are not called who are not subject to subpoena, it's always been stated that the failure to call them --

THE COURT: Never heard it. If somebody makes that statement in summation, you have a right to request the judge to make a charge to the jury that he is unavailable pursuant to compulsory process or control and, therefore, he is not -- no inference can be drawn from the failure to

call him.

MR. SCHULTZ: All right, your Honor, you have ruled and that's it.

THE COURT: I want to tell you. You have indicated you were going to speak about Dr. Gervin.

How long have you got? You have another doctor here?

MR. SCHULTZ: I have the other doctor and I have maybe another witness or two. I am not sure yet.

THE COURT: Does that finish your case?

MR. SCHULTZ: Yes, sir, the doctor and either one or two more witnesses.

THE COURT: We will see if we can get them all in today.

MR. SCHULTZ: I would respectfully request that it is now, as I see it, ten after three. I know I will be awhile with Dr. Baird. My other witnesses I didn't indicate that I would use them today.

THE COURT: Then we will go to the jury tomorrow. Okay.

(Recess)

THE COURT: You may proceed.

MR. SCHULTZ: Dr. Baird.

D U K E B A R N E T T B A I R D, called as a

witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: All right.

DIRECT EXAMINATION

BY MR. SCHULTZ:

Q Dr. Baird, where is your office, sir?

A I am in Hialeah, Florida, which is right outside of Miami, 2825 East Fourth Avenue.

Q Doctor, are you a doctor duly licensed to practice medicine in the State of Florida?

A Yes, I am.

Q Are you licensed in any other state?

A Yes, sir, New York and Alabama.

Q Doctor, do you have any specialty?

A Yes, sir, orthopedic surgery.

Q Doctor, would you be good enough to tell us when you got out of medical school and where you went? Give us your educational background, if you will.

A Yes. I graduated the University of Alabama Medical School in 1949. I had a year of internship at the National Naval Medical Center at Bethesda, Maryland. I had a year of surgical residency at the Lloyd Nolan Hospital in Alabama. I had two years in service, Air Force and Navy primarily in orthopedic surgery. Then in 1953 I had a three

year residency program at the Columbia Presbyterian Medical Center in New York City in orthopedic surgery. Then I went down to Florida in 1957 and have been practicing orthopedic surgery there since then.

Q Doctor, do you have a specialty in any way?

A Yes, sir, I am an orthopedic surgeon.

Q Sir, do you have any special degrees within your specialty?

A Yes, sir. I am an -- I belong to most of the usual medical associations, American, Southern, Florida and Dade County Medical Associations. That's where I practice. Also the Florida Orthopedic Society, Miami Orthopedic Society, also I am a fellow of the American College of Surgeons, I am a fellow of the American Academy of Orthopedic Surgeons, and I am a diplomate of the American Board of Orthopedic Surgeons.

Q Doctor, when did you become a diplomate of the American Board of Orthopedic Surgeons?

A 1959.

Q Doctor, would you tell us how one becomes a diplomate of the American Board of Surgeons?

THE COURT: Haven't we gone through that with the other doctor?

MR. SCHULTZ: If your Honor please, I believe it's

slightly different to become a diplomate of orthopedic surgery. I am not positive. I think he has to perform operations.

THE COURT: The doctor is qualified as an orthopedic surgeon, as a specialist and as an expert. I don't think we have to go into this again.

Q Dr. Baird, did there come a time when you examined Mr. Thomas J. Chiarello?

A Yes, sir.

Q Incidentally, Doctor, I believe -- I will get my records out here so I am not mistaken -- sir, were you questioned about this case sometime in January 15, 1976?

A About that time, yes.

Q Doctor, when did you examine Mr. Thomas J. Chiarello?

A Just about a year ago, February 5th of '75.

Q Sir, where did that examination take place?

A At my office in Hialeah, Florida.

Q Doctor, did you take X-rays at that time?

A Yes, sir, I did.

Q Do you have them with you?

A Yes, sir, I do.

Q Now, Doctor, I assume that the examination -- withdrawn.

Did your examination concern itself with the orthopedic

aspect of this gentleman?

A Yes, it did.

Q In conjunction with that, did you conduct a neurological examination?

A Yes, sir.

Q Now, Doctor, would you be good enough to tell us, were you given any records before you conducted your examination?

A Yes, I had multiple records, well, before or during the examination.

Q Doctor, did you examine the operative report that was contained in the hospital record pertaining to this man?

A Yes, sir.

Q Doctor, would you be good enough to tell us, if you will, the examination that you conducted, and do it piece by piece and give us your findings, if you will.

A I took a history first, and briefly he had been involved in an accident in June, June 30th of '72, when his car was hit from the rear by another car, knocking his car into the front. He said he had no immediate pain but a few hours later he said he had pain more in the neck area and the low back area. He also said he had pain in the right shoulder down to his fingers. He said the day after the accident he was seen by a Dr. Rothman in Staten Island who

in turn referred him to a neurologist whose name Mr. Chiarello couldn't recall. He was then examined and X-rayed and fitted with a collar for the neck. He then was given therapy treatments for about six months or so. He said he had no real change in his symptoms, therefore he went to an orthopedic surgeon in Staten Island who examined him and referred him to another neurosurgeon whose name he couldn't recall. He then went to Richmond, Virginia. I believe he has a cousin who is a gynecologist there, who sent him to a Dr. Rennie. I saw Dr. Rennie's report. He apparently was hospitalized in Richmond for five days in January of '73 and a myelogram was done of the neck and the low back, showing a small defect in the middle or central aspect.

Q Doctor, I don't mean to interrupt. The history has been done. I am just asking you at this point in the interest of time, will you tell us what you did with relation to the examination of this gentleman.

MR. LASSOFF: If your Honor please, the doctor may need this information as the basis of his examination.

THE COURT: It is not going to be read to the jury now, Mr. Lassoff.

A Then briefly, I went over his history and the reports, hospital reports, operative report, and some of the medical reports from the other doctors. Briefly, he had surgery in

December of '73 and a rhizotomy in October of '74, and then I saw him in February of '75.

At the time I saw him I then asked him -- what I do is I start at the top and work down, starting with the head, did he have any problems with the head. He said he was having headaches in the occipital area, which is the back of the head, coming on about two or three times a week, come back here, over the top and over to the forehead, coming on two or three times a week, lasting anywhere from fifteen minutes to a couple of hours. He was also complaining of some soreness in his neck both when he was sitting there without moving it and he said that moving his neck didn't really cause any discomfort but if he turned it rapidly or turned it all the way to the extremes in any direction he would have discomfort in the neck.

He said that he had no pain in either one of his arms but that his right arm felt generally weak. I asked him about his back. He said that his back was giving him symptoms about all the time. He said it was getting quite severe about 50 or 75 percent of the time. He said there was no pain in his right leg, however he felt, to quote him, a deadness in his right leg, where occasionally the right leg would give way. He said that moving his back would cause discomfort. I asked him specifically, does moving your back

hurt you or does this hurt you?

He said moving his back did hurt him.

I then took a past medical history. Specifically in reference to his back and his neck. He said he had no prior injuries or symptoms or examinations or X-rays or treatments to the back or the neck before this accident in '72.

He said he had no other accidents either before or after this one either with or without an injury and his only hospitalization previously had been for a tonsillectomy and an appendectomy. I then did a physical examination. He was undressed for the examination and an orthopedic gown was put on him, which is open down the back. He was a slightly obese, 38 year old man who was using a cane in his right hand. He had a well-healed scar in the midline of the lower back area from his prior operation. I examined his neck. He had a full range of neck motion.

Q Excuse me, Doctor. When you tell us you examined his neck, would you be good enough to tell us how you conducted this examination?

A Yes. I actually put my left hand on the neck so I could feel the muscles during the examination, put my right hand on top of the head and carried it bending forward, bending backwards, turning to the right, turning it to the

left, tilting it to the right, tilting it to the left and also circumduction, carrying it around in a circle.

He had a full range of neck motion. He complained of discomfort on the right side of his neck on bending it forward and on turning it to the left. He complained over here. There was no discomfort on turning it to the right or tilting it backward or on circumduction, in other words, carrying it in a circle. He had no spasm of the muscles either when he was standing at rest or during the motion of his neck.

Q Doctor, with relation to that, is spasm--would you tell the Court and jury what spasm is?

A Spasm, what I interpet it, it is a protective mechanism of the body that when you have a significant degree of pain in an area the body will involuntarily tense the muscles on both sides of the joint so as to -- that is giving the pain so as to prevent joint motion and prevent you from having more pain.

Q In other words, Doctor, spasm is a tightening of the muscles, is that correct?

A It's an involuntary tightening. It's something he doesn't have control over.

Q Fine, Doctor. In other words, the patient has absolutel no control over a spasm?

A That's correct.

Q Correct. And did you find any spasm?

A No, he did not have any spasm.

Q That is not under his control, is that correct?

A That's correct.

Q And, Doctor, with relation to pain, is that -- in other words, in order to determine whether there is pain, you must rely on the patient telling you, is that correct?

A Yes.

Q In other words, that is subjective?

A It's a subjective finding, yes, sir.

Q With relation to either presence or loss of sensation, that is within the control of the patient, is it not?

A Well, that is a subjective thing. It's something I can't see or feel or measure.

Q You have to rely on him?

A Yes.

Q However, spasm he has no control over?

A Yes.

Q And you found none?

A No.

Q All right, proceed, please.

A I then checked his shoulders. He had a full range of shoulder motion in raising the arms all the way overhead

and also turning them all the way in, which is internal rotation and turning them all the way out, which is external rotation. He complained of some discomfort in the low back on raising his right arm over his head and some discomfort between the shoulder blades on turning his right arm back behind his back.

I did a neurological examination of his arms. His reflexes were what I would classify as sluggish, in other words, in the range of one to three they would be a range of one. Two is normal and three is hyperactive.

Q Doctor, you did this neurological examination of his upper extremities, is that correct?

A Yes.

Q Doctor, did the operation at L4 and L5 have anything to do with the nerves in the upper extremities?

A No, there would be no connection.

Q Doctor, you found that his reflexes in his upper extremities were sluggish, isn't that correct?

A Yes.

Q Doctor, in your opinion, did that have any connection whatsoever with this operative procedure at L4 and L5?

A No, it has no connection.

Q All right, Doctor, go ahead.

A As I say, his reflexes were sluggish, in other words,

checking the biceps and triceps back here and the flexor carpi radialis. They were sluggish but equal. So that's more or less normal.

Q Doctor, before we go any further, you have said that they were sluggish and equal.

A Yes.

Q Does the fact that they are equal and sluggish have any indication to you or have any significance to you?

A Yes, it does. If they are equal and sluggish, I would classify that as normal.

Q All right.

A There was no atrophy of the muscles, including from the shoulder girdle up here in this area, the arms, the forearms or the intrinsic muscles of the hand.

Q Doctor, when you say there was no atrophy, would you be good enough to tell this Court and jury first of all what that means?

A It means a wasting of the muscles or a decrease in size of the muscles in those areas.

Q And you found no wasting?

A That's correct.

Q You found no shrinking?

A No.

Q Did you find the movement of the muscles of the arm

and hand -- could you tell us what your findings were with regard to that?

A On checking his musculature, in other words, in gripping, there is a balancing between the ones that flex or flex like this and the ones that extend so that you can expend a lot of effort but there is actually no pressure applied. You just tighten both those muscles and balance them out. The function is normal, so it's not significant.

Q Did he have normal function?

A Yes. There was no apparent dysfunction -- well, what we do is we check -- there are three primary nerves in the arms, the forearms: the ulna, median, radial nerves. There was no dysfunction of these nerves. I then did the examination on his back. On his back again I take him through a full range of motion of the back. He had full range of motion in bending backwards and in bending to the right and in bending to the left. On bending forward the patient would involuntarily just stop and wouldn't bend any further.

Q What does that mean, Doctor?

A Well, this is not what I would classify as an involuntary range of motion. In other words, some people in the presence of pain cannot bend any further. When this occurs, you will have muscle spasm and the muscles will actually lock

the back so that you can't move it. He bends that far and if the muscles are in spasm he doesn't bend any further.

Q Did you find any spasm in this man's back?

A No, there was no spasm in the back either, either when he was standing at rest or when we were going through the motions.

Q Did you find any splinting?

A No, sir.

Q In his back?

A No, I did not.

Q Doctor, those are signs which are not under his control, is that true?

A Yes.

Q All right, Doctor, would you continue, please?

A He complained of discomfort on bending forward, on bending backward and to the right, with no discomfort on bending to the left.

On heel and toe walking --

Q Incidentally, Doctor, before we leave that, with relation to his back, did you find any physical non-subjective abnormalities that you could see?

A That would be an objective finding. The only objective finding was the scar on the back. No other objective findings.

Q Did you find any other objective findings other than

the scar?

A No.

Q All right.

A On checking his legs, I tried to get him to heel and toe walk. Actually what this does, we are not checking anything except the power of the muscles that pull the foot up or the ankle up, rather, and the muscles that pull the ankle down. On the right side he said he couldn't do either one, in other words, the one to pull it up or pull it down. The left side was all right.

On checking out the muscles, however, in other words, with the patient sitting with the legs over the side and checking the muscles that pull the toes up and pull the ankles up on the right side, there was no weakness of these muscles that I could see would interfere with the patient's complaint.

Q Doctor, did you find any atrophy there?

A No. I measured both in the calf region and up above the knee. There was no muscle wasting. He measured sixteen inches on both calves and seventeen and a quarter inches supracondylar region.

Q Doctor, when there is no atrophy and no wasting, what does that indicate to you?

A Well, it would indicate that there is no interference

of the nerve supply to those particular muscles that are not wasted or atrophied and it would also indicate that you are not favoring that side, or one side or the other.

Q Would it indicate to you, Doctor, that he is using those muscles?

A That is what I mean, that you are using it without favoring.

Q Doctor, when you asked him to do the heel and toe walking, what did he do?

A He just -- he wouldn't do either one. He would walk flat on his foot.

Q Walk flatfooted?

A Yes.

Q What else, Doctor, please?

A We did reflexes. There is a knee jerk on both sides. All of the reflexes again were sluggish. All of the reflexes again were equal. I did three, the knee jerk, the ankle jerk and one under the foot called posterior tibial reflex which related to the ankle jerk, the same nerve root.

Q And you found them to be equal?

A Equal but sluggish.

Q On both sides?

A Right.

Q Does that indicate to you, Doctor, any injury to the right -- to the nerve coming out of L4 and L5 on the right, the nerve root?

A No, that would not indicate any injury. It would be a normal reading.

Q Doctor, if there was an injury or damage to the nerve root at L4 and L5 on the right, would the reflexes be equal or both sides?

A Only -- they wouldn't be equal if there was some real nerve dysfunction such as a muscle weakness or something of that. You could have some involvement with equal reflexes, though.

Q Doctor, in your opinion, would the fact that the knee jerks were equal on both sides and sluggish, do you have an opinion as to whether or not there was any nerve root involvement at L4 and L5?

A Yes. I don't see any either subjective or objective actual findings to indicate nerve root damage at L4-5, particularly on the right.

Q All right, Doctor. What else did you do?

A I checked his pulse, color and temperature. In the feet it was equal. In checking it for tenderness, he complained of tenderness about an inch and a half above the scar on his back which the scar was at about L3. So this

would be at up about -- there are five vertebra in the back and we number them L1, 2, 3, 4. So his scar went from L3 down to the midsacrum. So he would be tender like from L1 down to the -- L2, rather, down to the midsacral region, which is down below the last joint. He also had tenderness out over the right iliac crest and the right buttocks. Which I wouldn't associate with any particular finding.

Q Now, Doctor, did you take X-rays?

A Yes, sir, I X-rayed his neck and his back, low back.

Q Doctor, those X-rays I believe were placed in evidence here.

A Yes, I have them here.

MR. SCHULTZ: Can we have the box, please?

(Pause)

MR. SCHULTZ: If the Court please --

MR. LASSOFF: That is an old marking.

MR. SCHULTZ: You had offered them in, had you not?

MR. LASSOFF: Apparently not.

MR. SCHULTZ: I thought you had.

MR. LASSOFF: I don't think we did. You might as well mark it as your exhibit again.

MR. SCHULTZ: If your Honor please, I thought these are in.

gw/lf Baird-Direct 546

Q Doctor, did you take these X-rays?

MR. LASSOFF: I don't object to the X-rays, Mr. Schultz. You can put them in.

xxx (Defendant's Exhibit A received in evidence.)

Q Doctor, these X-rays were taken under your supervision, were they?

A Yes, sir.

Q And what are they dated, please?

A February 5th of '75.

Q Doctor, did you take X-rays of this gentleman's cervical spine?

A Yes, sir.

Q Would you be good enough to come down to the side and put them in the box and explain to the jury what your findings were?

A This is a side view of the neck bending downwards like this to show motion of the vertebra. The spacing between the vertebra. This is the skull up here, the shoulders down here, the chin out here.

I took two side views, one bending down and one bending backwards. That is an oblique view, that's oblique.

This is a side view bending backwards. He is facing in that direction. There is normal spacing between these vertebras. The disc is normal, there is no evidence of

fracture. The alignment is normal. The positioning is normal.

Q Doctor, put that back in there, please, will you, please?

Doctor, how many cervical vertebra are there?

A There are seven cervical vertebra.

Q Doctor, in between these cervical vertebra are there spaces?

A Yes, sir.

Q Are these spaces in part maintained by discs?

A Yes, they are.

Q Doctor, is the space between C1, 2, 3, 4, 5, 6 and 7, are they in normal alignment and in normal spacing in this photograph or are they not?

A There is normal alignment and spacing, yes, sir.

Q All right, Doctor.

In reviewing the X-rays of the cervical spine, what was your opinion?

A That there were no abnormal findings in the X-rays.

Q Doctor, did you find any neurological involvement with relation to any of the nerves that would come down through the cervical vertebra?

A No, I didn't.

Q Would they manifest themselves in the upper arm, the

upper appendages?

A The ones that exit at that level would, yes.

Q Did you find any involvement in any of those?

A No.

Q All right, Doctor, would you now show us, did you take X-rays of the lumbar spine, did you?

A Yes. We took low back X-rays. This is a front view from the back, actually. You are looking at it as if you are looking at the back of the patient so that the left is on that side. There are five lumbar vertebra, one, two, three, four, five. This is your sacrum here. This is your pelvis here. These are the limbs here.

The little white spot you see here is the Pantopaque from the previous myelograms that the patient had had.

Q Doctor, excuse me. This X-ray was taken obviously, sir, subsequent to this gentleman's operative procedure in December of '73.

A Yes, sir.

Q Would you be good enough to tell us or show this Court and jury, if you will, the interspace between L4 and L5?

A Yes. That would be over on this side right here, this level here.

Q Doctor, is that the operative site?

A That's the operative site.

Q Doctor, can you tell us, first of all, what your findings are with relation to the interspace between the L4 and L5 as of February 5, 1975?

A In looking at these, you can see, at least it appears to me, that there has been a small amount of bone removed from the lamina on the right side or the interior edge of the L4 lamina, what we call L4. Lamina is the arch that goes across.

Q Incidentally, Doctor, do you do hemi-laminectomies and disc excisions?

A Yes, we do.

Q Not we. I mean you.

A I.

Q All right, Doctor. Is there anything significant in that X-ray that you should tell us about?

A No. The significance is that it would confirm the history that he had had an operation at that level and he had a myelogram. Other than that, there is no finding.

Q Is there any evidence of a myelogram there?

A Yes.

Q Would you tell this Court and jury what it is?

A This is a globule of the dye. I don't know if you can see it from back there, but there are several small little

specs along in here which is from your myelogram.

Q All right, Doctor, would you remove that. Do you have any other photos of the lumbar spine?

A Yes. This is a side view of the back. I have got two oblique views of the back but they really don't show anything significant.

On the side view of the back, this is the sacrum, fifth, four, third, second, first lumbar vertebras. In coming down, the dark spaces between the bones, the white naturally is the bones, the dark is the disc between the bones. In coming down ordinarily you expect each successive disc to be a little larger than the one above it. In other words, as you come down at this level here, note the space between these two bones, this space is just slightly larger than that space. This space is slightly larger than that space. This space is larger here. However, if you look here, this space to me is slightly smaller than this space here. It's supposed to be smaller than this one.

THE COURT: You keep saying this space and this space. The record doesn't know what you are talking about.

THE WITNESS: I am sorry. The L4-5 interspace is slightly smaller than the L3-4 interspace and actually it should by rights be larger. The L4-5 is smaller than the L5-S1 but it should be smaller. I read this as a dent in

the area of the L4-5 interspace which would be commensurate with the patient's operation.

Q Doctor, looking at that X-ray and the space between L4 and L5, are you able to look at that interspace, Doctor?

A Yes, sir.

Q Is the narrowing of that space sufficient to cause an impingement of the nerve?

A You wouldn't read an X-ray like that. Narrowing of a space would have nothing to do whether a nerve was impinged or wasn't.

Q You cannot tell by that?

A No.

Q All right, Doctor, thank you.

Doctor, does that **constitute the X-rays that you took basically?**

A Generally, yes.

MR. SCHULTZ: Could we have the box down, please.

(Pause)

Q Now, Doctor, after having reviewed the X-rays of the lumbar spine, did you reach a conclusion with relation to this man's lumbar spine?

A Yes.

Q What was that opinion, sir?

A As I say, my conclusion would be that the patient had

some narrowing of L4-5, did have some radio-opaque dye within the canal and had evidence that he had an exploration at L4-5 on the right side.

Q Now, Doctor, did you review the operative record of the Golden Isles Hospital?

A Yes, sir, I did.

Q And, incidentally, Doctor, you spoke to me for the first time on January 15, 1976, isn't that true?

A Yes, sir.

Q Doctor, did we discuss this operative procedure and your report today at lunch time?

A Yes.

Q Now, Doctor, would you be good enough to tell us where this operation was first commenced, in other words, where did they first go in?

A He was placed, according to the report, face down on the table under general anesthesia and they made an incision over the back of L3, L4 and L5 down to the sacrum, S1. They first went in at the L3-4 interspace.

Q Doctor, when they went in at the L3-4 space, the surgeon did this, is this correct?

A I would presume so, yes, sir.

Q Doctor, that was not the scene or the site of the disc, was it?

A No. The reading on the myelogram had been at L4-5.

Q In other words, Doctor, they went in at the interspace above the original or the scene or the site of the injury, is that correct?

A It would appear that, yes.

Q Doctor, then what did they do? Did they then go into L4 and L5?

A Yes. There was a negative exploration there. They went in at L4-5.

Q Between the time they went in at L3-4, did they send down for more X-rays?

A No. Actually they got an X-ray in the operating room. They sent down and had a man come up.

Q They brought the X-ray up?

A Portable X-ray.

MR. LASSOFF: I object unless there is something like that in the record. I don't know if he is reading from a record now.

THE COURT: Is that in the record?

THE WITNESS: Yes.

THE COURT: He says it is in the record.

MR. LASSOFF: May we have that part read, your Honor?

THE WITNESS: "Initially the 3-4 interspace was

"identified and opened but it was a negative epidural exploration. X-rays confirmed that we were at L3-4 and our attention then went to L4-5."

THE COURT: All right.

Q Now, Doctor, in that operative report it indicates that there was scarring -- I will read it myself so I am correct.

MR. LASSOFF: Your Honor, may we have the witness testify what the report indicates and not Mr. Schultz?

THE COURT: Let the doctor read it.

MR. SCHULTZ: If your Honor please, Mr. Lassoff was asking the same questions. I objected.

THE COURT: Mr. Schultz, ask the doctor to read what you want him to read.

MR. SCHULTZ: May I look at this, then, if your Honor please?

Q Doctor, would you look at the operative record down at the bottom where it talks about the nerve root?

A Yes.

Q Would you read that, please.

A Starting with, "The nerve root was seen"?

Q Yes.

A "The nerve root was seen to be markedly adherent with scar and frayed."

Q Doctor, is it possible for you, in your opinion, is it possible in your opinion to determine when that scar came into being?

A No, I can't age a scar. In other words, if I look at a scar, I can't tell whether it's been there anywhere from three months to ten years.

Q No way of telling, is there, Doctor?

A I can't tell. I don't know if anyone can tell. I can't tell.

Q Doctor, scarring, what does it come from?

A Scarring is a couple of things. It's a normal aging process and also it's a repair type of process by the body, where you can have tearing or trauma, which is injury -- trauma is injury -- to an area causing bleeding, the bleeding then turns into clots and turns into fibrous tissue which is scarring.

Q Now, Doctor --

A Excuse me. There are other things. You can have infection in an area that could cause scarring also or any infection would be -- inflammation from an infection.

Q Doctor, does scarring by itself such as described in that operative report, does that cause pain?

A Well, scarring is sort of like X-ray changes, let's say, in a back. All of us as we get older get X-ray changes

or arthritis in our back, but with the X-ray changes you can't tell even if they are severe who has pain with them and who hasn't pain. Also as we age all of us get scarring or fibrosis or loss of elasticity of our tissues in the spinal canal so that we all have scarring. Some of those people will have symptoms and some will not, but you can't tell who's who.

Q Doctor, scarring in and about the area of this operative site, Doctor, does that always come from trauma or can it come from natural causes?

A It's usually trauma, either a trauma over a short period or trauma over a long period, in other words, increased amount of wear and tear at a particular level. This is a day-to-day trauma, repeated insults to that one area. It comes from something of that nature.

Q Doctor, in your opinion, if a man were engaged in the stevedoring business and lifting weights over a period of ten or eleven years and not as a weight lifter, I mean as a stevedore, lifting pounds from one to a hundred pounds, in your opinion over that period of time would that be capable of producing scarring and wear and tear on the tissues?

MR. LASSOFF: Objection to the form of the question, your Honor.

THE COURT: Overruled.

MR. LASSOFF: May I point out there is no testimony as to frequency, once a day, a hundred.

THE COURT: Overruled.

A What was the final question, could it?

MR. SCHULTZ: Read it back, please.

A It could or it couldn't.

(Question read)

A Yes, it would be capable of doing that.

Q Now, Doctor, after having examined this man, did you reach a conclusion with reasonable medical certainty and in your opinion can you tell us is this man capable of performing any work?

A Yes, he can work. I want to disqualify myself as an occupational expert as to what different jobs are, but I would recommend he not do any lifting, say, of over 30 pounds. I would recommend he not do any jobs that require repeated lifting or repeated bending or any jobs that would require him working in a bent over position for any period of time or any prolonged walking or prolonged sitting without being able to take a break.

Q Did you reach an opinion, Doctor, as to whether or not this man had any disability of the body as a whole?

A Yes, I did.

Q And what was your opinion as to that?

A As far as the neck is concerned, I don't really feel there is any disability in that area. As far as the low back is concerned, I do feel that he has approximately ten percent disability of his body as a whole as a result of the findings in his back.

Q Doctor, could you tell us in your opinion, is he capable of walking without a cane?

A Yes, in my opinion he is.

Q Doctor, did you notice in which hand he carried his cane?

A Yes,he carried it in his right hand.

Q Doctor, in your specialty as an orthopedic surgeon, do you advise patients as to the use of a cane or walkers?

A Yes, quite a bit.

THE COURT: Canes and walkers are different, aren't they?

THE WITNESS: Yes.

MR. SCHULTZ: All right, sir.

Q When I talk about a walker I talk about the Canadian walker.

THE COURT: Canadian crutch they call it.

Q I am sorry. I will withdraw it.

Do you advise people as to the use of a cane and a

Canadian crutch?

A Yes.

Q And a Canadian crutch, would you tell the Court and jury exactly what that is?

A You have probably seen them. This is the one where it is an aluminum strut with a cut in the middle that fits around the wrist so it holds the crutch there. Then it has a hand grip that comes out at a right angle. You stand actually as you should stand on your crutches with the weight on the arm. This is different than the other type of crutch which comes up to the armpit.

Q Right. Doctor, if there is a weakness in the right lower appendage, in other words, the right leg, and you prescribe a cane, what hand do you have them carry the cane in?

A They carry it in their left hand so that when they put their weak or painful right leg down they take most of the weight on their crutch on the other side, or cane.

Q Doctor, is that the accepted procedure in the field of orthopedic surgery?

A Yes.

Q Is that accepted in the states of Florida and New York where you are licensed to practice, and Alabama?

A It's general practice, yes.

BEST COPY AVAILABLE

gw/lf Baird-Direct 560

Q Doctor, there is a report in that hospital record about frayed.

Doctor, does frayed or fraying, does that come -- how does that come into being, that fraying or frayed?

A Fraying is something -- in other words, fraying would be like a mop, in other words, a bunch of fingers. This is a mechanical procedure. It's not something -- it is something that has to be mechanically injured to fray it.

Q Does that come from trauma or does that come from the operative intervention, in your opinion?

A Probably in trying to work the nerve over to the midline, it would occur at that time, especially if there are adhesions in the area. It might be very difficult to get it over there.

Q Would that be part of the operative procedure?

MR. LASSOFF: Would Mr. Schultz allow his own witness to finish his answer.

Q Did I interrupt you, Doctor?

A I said particularly if you were having difficulty in pulling it away from the adhesions.

Q Did you want to say anything after that?

A No.

Q Doctor, did that happpen, in your opinion, during

the course of the operation or in the course of sustaining the injury, if any?

A If it's as it was, I would assume it occurred at the operation.

Q All right, Doctor.

Doctor, did you read the report in the Golden Isles Hospital about the medical examination?

A Yes.

Q Doctor, I want you to tell this Court and jury, did the medical report indicate that this man had hypertension?

A I don't have the report here. I don't recall.

Q I have it here.

MR. LASSOFF: If your Honor please, this was gone through in detail. It is not in the doctor's report. We are now going beyond his report.

THE COURT: It seemed to me it is in the hospital record.

MR. LASSOFF: We concede it is in the hospital record.

THE COURT: I assume he wants to ask the doctor some questions about it.

A You asked about hypertension?

Q Yes. Does it indicate in this report, sir, that he had hypertension and takes Arlidin?

gw/lf Baird-Direct 562

A I don't see anything about Arlidin here. It does mention his blood pressure is 140 over 104.

Q Turn the page.

A Yes,

Q Down further, Doctor, it indicates smokes three to four packs of cigarettes a day, is that correct?

A Yes.

Q Doctor, it also indicates that his blood pressure is 140 over 104?

A Yes, sir.

Q Doctor, the 140 is what rate?

A It's what you call systolic.

Q And the 104 --

A Relaxing rate or diastolic.

Q Doctor, could you tell us in your opinion whether or not -- what is your opinion with relation to the diastolic rate?

A I call the diastolic high.

Q Doctor, in your opinion, a man of 39 or 38, who weighs 260 pounds, who is hypertensive --

MR. LASSOFF: Objection, your Honor, right there. There is no testimony the plaintiff is hypertensive at this time.

THE COURT: Is there any record as to his blood

pressure taken at any examination in the last year?

MR. LASSOFF: No, your Honor.

MR. SCHULTZ: No, there isn't.

THE COURT: At that time you will have to frame it, the jury knowing there is no present evidence of hypertension.

Q Doctor, I want you to take into consideration that this man in December of 1973, was hypertensive, smoked three packs of cigarettes a day, weighed 260 pounds. Do you have an opinion, Doctor, as to whether or not that factor or those factors would have any effect on his life expectancy?

A Yes. All of those would have a deleterious or harmful effect on his life expectancy, overweight, hypertensive and smoking.

Q Doctor, I want you to assume now that this gentleman at the present time weighs 260 pounds, smokes two packs of cigarettes a day, could you tell us, sir, whether that would have an adverse effect on his life expectancy?

A I would expect it would have an adverse effect on his life expectancy, yes.

MR. SCHULTZ: I have no further questions, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LASSOFF:

Q Doctor, when Mr. Chiarello came to you did he bring certain materials with him for you to examine?

A I believe he did, yes, sir.

Q Did he also bring you an authorization to inspect the hospital record of the Golden Isles Hospital in Hallandale, Florida?

THE COURT: Does it make any difference? The doctor said he looked at them.

A I don't specifically recall that, but I have seen those records. I think he brought them in with him.

Q What I am asking you about specifically, Doctor, is did you have authorization to go to the hospital to look at the X-rays and myelograms?

A Not to my recollection.

Q Did you ever go to the hospital to look at the X-rays and myelograms?

A No, I did not.

Q Doctor, isn't it a fact that a herniated disc will not show up on an ordinary X-ray?

A That's correct.

Q Isn't it a fact the test used to ascertain whether or not there has been a herniated disc is a procedure called a myelogram?

A Yes.

Q And is this procedure not only to prove the presence of a herniated disc but to locate the site of a herniated disc?

A Yes.

Q And is it a fact in New York and possibly in Florida that no orthopedic or neurosurgeon would perform an operation to remove a herniated disc without a myelogram?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A The majority of the doctors would do a myelogram first.

Q Doctor, when you were here a couple of months ago did you look at the myelograms that were taken?

A I don't recall. I think I glanced at them.

Q Doctor, would you take a look at the myelogram taken at the Golden Isles Hospital prior to the surgery and tell the Court and jury what it reveals to you?

MR. SCHULTZ: Objection, your Honor.

THE COURT: What exhibit are you referring to?

MR. LASSOFF: Plaintiff's Exhibit 15 in evidence.

THE COURT: Objection overruled.

A This is December 3, 1973.

Q Correct.

Q This is a cervical myelogram of transtable type, cervical. I am just trying to get these out of the way. This is cervical.

Q The cervical myelograms are negative, are they not?

A It doesn't show anything in particular there. That's cervical. That is an ordinary cervical X-ray. This is an ordinary low back X-ray, side view.

THE COURT: Is there anything on it? You say an ordinary side view low back X-ray. Does it reveal anything?

THE WITNESS: There is a little thing at 4-5, it looks like a little thing, but I can't make a good determination because I only have two spaces to compare it to, your Honor.

THE COURT: All right.

A This is a side view of the neck, also, and bending forward film similar to the ones that I have.

These are cervical X-rays, front view. This is just a front view of the neck. This is what you call a odontoid view of the neck with the mouth open.

You don't have any myelograms of the back here.

Q Doctor, maybe they got put in the wrong folder by mistake.

A Let me see what these are. These are Golden Isles, December 2nd and 3rd.

Q Here are a couple of more, Doctor. These must be the myelograms. They must have gotten into the wrong folder by mistake. They have the same dates on them.

A This is the 3rd of December, Golden Isles. This is sitting again as if you are looking at the back of the patient so his left is on this side and the R is on the other side where the R is. This is the last joint down. This is L5, this is S1. The nerve roots on both sides are equal. This is L4, this is L5. On the right side you have got a little indentation but actually it's more of an indentation, according to this marker, on the left side. This is an oblique where you are lifting the left side up so you can look down sort of obliquely at the left side of L4-5, showing that there is an indentation on the left at L4-5.

Q What does that mean, Doctor?

A This could be scarring, it could be -- it's called epidural pressure at that level.

Q Was the myelogram taken before the operation, Doctor? Doesn't it show more than scarring?

A These are dated December 3, 1973. The operation was the 5th, I believe.

Q Doesn't that show the presence of a herniated disc

as well as scarring?

A It could be scarring or disc, either one, yes, sir.

This is an additional view taken the same date, same hospital. One is again -- the right side is on your right as you are looking at the back of the patient with the patient tilted up toward you. I don't know if this is L4-5, but there is an indentation on the right side at this level and then tilting the other way at L4-5 while tilting the other way there is an indentation on the other side. It is a bilateral defect at that level.

Q What does that bilateral defect indicate to you, Doctor?

A I would interpret that as a disc or scarring, either one.

Q Herniated disc and/or scarring?

A Yes, sir.

MR. LASSOFF: May I have those two X-rays which are really the myelogram, your Honor, marked as Plaintiff's --

THE COURT: 15A and 15B.

(Plaintiff's Exhibits 15A and 15B received in evidence.)

xxx

Q Doctor, when you were here the last time, you looked at the myelograms that had been taken at the Memorial Hospital on July 28, 1975?

A I really don't know.

Q Would you take a look at them, Doctor, and tell us what, if anything, they reveal to you?

THE COURT: 16A, B and C?

MR. LASSOFF: Yes, your Honor.

A 16A is dated July 28, '75. It's what you would call a transtable myelogram of the lower lumbar area. What you are looking for actually is this dye as the patient is lying on his stomach. The dye is heavier than the fluid in the canal so the dye will tend to gravitate down toward the ground. So you are looking to see if there is anything bulging at the disc spaces that the dye can't cover. I would interpret this transtable as a negative lateral myelogram covering L3-4, 4-5 and L5-S1.

Q Which one is that?

A 16A.

16B was taken 7/28/75. I think I have got it right. This looks like this is the left side to your left again. So you are looking at the back of the patient. This is your sacrum down here. This is toward the head. This is your fifth vertebra, this is your fourth vertebra. So on the right side at L4-5 again you have your blockage or defect at that level on both the right and the left sides on two oblique films at that L4-5 level.

gw/lf Baird-Cross 570

Q Doctor, wasn't that blockage removed at the time that the disc was excused?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: The original blockage, Doctor.

Show him an X-ray after the --

MR. LASSOFF: May I withdraw the question?

Q These X-rays were taken after the laminectomy?

A Yes.

Q And during the laminectomy, wasn't it part of the purpose of the laminectomy --

THE COURT: These X-rays were taken on July 28, 1975, after the laminectomy?

MR. LASSOFF: That is what I am saying.

Q When that laminectomy was performed, wasn't most or all of the disc excised?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. SCHULTZ: This isn't proper cross. This is his witness. He is leading his own witness now.

THE COURT: Overruled.

MR. SCHULTZ: If your Honor please, it was a hemi-laminectomy.

THE COURT: All right, call it a hemi-laminectomy.

Q Hemi-laminectomy.

A It was a partial laminectomy.

Q We accept that.

A Most of the material had been removed from the right side, according to the operative report, at L4-5.

Q So that after that operation there should no longer have been any blockage in that area, is that correct?

MR. SCHULTZ: Objection.

THE COURT: You are asking him whether there should be.

Q Was the purpose of the operation to remove the pressure on the spinal cord at that area?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes.

MR. SCHULTZ: He is talking about the cord.

THE COURT: Excision of the disc, Mr. Schultz.

MR. SCHULTZ: He said to remove the pressure on the spinal cord. There has been no testimony as to cord here.

MR. LASSOFF: The doctor just said so.

Q Doctor, when the disc was excised, would the blockage that had been present before the excision of the disc been gone?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes. Ordinarily what happens is that --

Q Right now, Doctor, would you give me an answer and I will ask you another question.

MR. SCHULTZ: He is not letting the doctor finish.

THE COURT: He is asking a simple question.

MR. SCHULTZ: He didn't answer.

THE COURT: I can't hear him.

(Question read)

THE COURT: Overruled.

Q Just yes or no, Doctor.

A You are mixing.

Q If you can't answer it, say you can't answer.

A I can't answer it.

Q What would happen as a result of that laminectomy with regard to that blockage?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A If the blockage was secondary to a bulging disc at that level and it's bulging and it's pressing in on the sac of the spinal cord and root at that level, which is why the dye can't go there and, therefore, it's dark, if you take out the disc then that particular bulging should be eliminated.

Is that right?

Q Yes. So that the bulging or, rather, the blockage that you see in those new myelograms, is that either a result of a new herniated disc or scarring, Doctor?

A No, this is a usual -- what you will see following an operation of this nature. It's what we call an operative defect. In other words, when you operate on a disc and then do a later myelogram, you do get scarring or adhesions at that level, which is a necessity, and it will show a film like this. So you are not really operating on a myelogram, you are operating on the entire picture.

Q Is it your testimony, then, that the new myelogram shows scarring or adhesions?

A Yes, I would say that.

Q And was that scarring or adhesions the result of the herniated disc?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A No, I would think that the scarring or adhesions are a result of the surgery rather than the disc.

Q Doctor, isn't it a fact that you have testified to Mr. Schultz that the scarring could not be determined by you on the myelogram within three months to ten years, isn't that what you testified to?

A No. I testified that in looking at the scars visually with my eyes I couldn't tell you an age on the scarring, whether it's three months old or ten years old. You can't tell for me whether it is scarring or not on a myelogram.

Q You can when you go into the spine, though, can't you?

A When you are operating, yes.

Q Would it be fair to say, Doctor, the scar to form would take at least three months?

A Six weeks.

Q In any event, the scarring that was present and that was found in the surgical procedure would have taken at least six weeks to form and could not have been produced by the operation, is that correct, Doctor?

A Yes.

Q So that the operation itself had nothing to do with any of the scarring that was found by the operating surgeon at the time he went into that spine?

A That would be right.

Q Now, Doctor, I think you can take your seat again. I didn't mean to keep you standing.

Somewhere along the way I heard you testify about arthritis and aging processes. How old was Mr. Chiarello at the time of this accident?

A 35.

Q And is it customary to have arthritis to any marked degree in a 35 year old man?

MR. SCHULTZ: Objection as to form, your Honor.

THE COURT: Overruled.

A No, usually you wouldn't have any marked arthritis at age 35.

Q Incidentally, Doctor, it is a fact, is it not, that the X-ray that you took of Mr. Chiarello's spine, both lumbar and cervical, did not reveal any arthritis whatsoever?

A That's correct.

Q So that he didn't have any arthritis?

A He didn't have any changes of the bone.

Q Which would indicate that he had arthritis?

A Which --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Which is one form of arthritis, yes.

Q Now, Doctor, since you didn't look at the myelograms prior to making your report, I assume you based your opinion as to the operation on the operative report that was furnished to you?

MR. SCHULTZ: Objection, if your Honor please. What's in evidence is his testimony, not the report.

gw/lf Baird-Cross 576

THE COURT: I think you can leave the fact he didn't see the myelograms before.

Q Doctor, since you didn't see the myelograms, did you base your opinion in part on the operative report of the operating neurosurgeon which was furnished to you?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A Yes.

Q And would you tell me, what did you consider in making an opinion -- what parts of the neurosurgeon's report did you consider?

MR. SCHULTZ: Objection, your Honor. We don't know what report he is talking about.

THE COURT: The operative report of the Golden Isles Hospital.

MR. SCHULTZ: We don't know what opinion he is talking about.

THE COURT: He just gave testimony on direct examination in response to your questions. He is now being examined on the basis for that opinion.

MR. SCHULTZ: That is not the way I understood it.

THE COUET: That is the way I understood it.

Q Can you answer the question, Doctor?

THE WITNESS: Read it back.

BEST COPY AVAILABLE

(Question read)

A I considered the whole report.

Q In rendering a report, did you include the whole report or only portions of that report?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A No, I did not reproduce the report.

Q Doctor, as an orthopedic surgeon would the fact that you went into somebody's spine to remove a disc and found marked epidural adhesions and scarring be important to you?

A Yes.

Q Did you anywhere in your report mention the fact that the operating surgeon had found marked epidural scarring and adhesions with fraying of nerves?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

MR. SCHULTZ: Unless he wants to offer it.

MR. LASSOFF: I offer the report in evidence.

THE COURT: It is what he testified from the stand that is important, Mr. Lassoff.

MR. LASSOFF: I want to know the basis of that.

THE COURT: Let's do that, not what he put in his report.

Q Doctor, it was part of your job at this examination

BEST COPY AVAILABLE

gw/lf Baird-Cros 578

to make a report of your findings?

A Yes.

Q Anywhere in the report of your findings --

THE COURT: Mr. Lassoff, I told you that makes no difference. It's the statement of opinion given under oath that the jury is determining. You may cross examine him as to the basis of that opinion, but what's in that letter in front of you is immaterial.

Q Doctor, in making or rendering your opinion, did you consider the fact that this man had marked epidural scarring and fraying of nerves?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. SCHULTZ: What opinion?

THE COURT: The opinion he gave from this witness stand under oath in response to your direct questions.

MR. SCHULTZ: Opinion as to what, your Honor? He gave many opinions.

THE COURT: Overruled. Go ahead, Mr. Lassoff.

MR. SCHULTZ: I respectfully object, your Honor.

Q Can you answer that question?

THE WITNESS: Would you read it back again?

(Question read)

A Yes.

gw/lf Baird-Cross 579

Q And what, if any, effect, did that have on your opinion, Doctor?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A That there was pathology at that level.

Q What was the pathology that was at that level?

THE COURT: That there was marked epidural scarring and fraying.

Q And what was the result -- what result would that pathology cause?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A As I said before, just scarring doesn't necessarily -- isn't necessarily going to cause anything. I couldn't predict looking at the scarring, this one is giving symptoms, this one isn't.

Q Doctor, if the hospital record which you have seen indicated that the man left the hospital following this hemi-laminectomy with marked right-sided leg pain, would that indicate to you that this scarring was producing something?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A No, that would not be secondary to the scarring.

That would be secondary to the surgery.

Q Doctor, can you tell me how much of the disc at L4-5 was removed in this surgery?

A I believe he said 8 cc. That is a good amount. That's as much as you usually do remove.

Q I am not talking about the gelatinous material, I am talking about the disc itself. Can you tell me how much of the disc was removed?

A The disc is a gelatinous material, but when it degenerates it stops being gelatinous and becomes hard. They sent it down to pathology and pathology marked it down at 8 cc.

Q Is it fair to say most of the disc was removed in this excision?

A There is no way to remove all or most of the disc under any conditions. You remove as much as you possibly can, but there are areas you cannot get to, there are other areas you wouldn't think of going to because you would go into some other structure that you wouldn't want to damage.

Q Doctor, how did this man leave the hospital?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

MR. SCHULTZ: He wasn't there.

Q Doctor, were you familiar with the hospital records --

THE COURT: The record is there. It's in before the jury. You can refer to it, if you wish.

Doctor, what's a rhizotomy?

A The particular one that he had?

Q Yes.

A This is a posterior branch of the nerve root, it's a sensory branch that goes --

Q I am not asking you to explain the operation. I want to know what a rhizotomy is, first of all.

THE COURT: What do you mean what it is. If you ask him what it is, he is going to explain it to you.

MR. LASSOFF: Withdraw the question.

Q Doctor, for what reason would you as an orthopedic surgeon do a rhizotomy?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A A rhizotomy -- this is going to take a little while.

We start out most people don't do rhizotomies. Some people at this time are doing facet rhizotomies. This is based on the speculation that some people had had relief to back pain from a prior procedure which was an injection of a sclerosing agent in the area of the articular facets or the joints in the back. The sclerosing was at one time very popular as a method of treating back pain. Then they had

problems with that and then they didn't get the results the initial doctor felt --

Q Doctor, I think you have answered me already. Is it b[illegible] used to treat back pain? That is all I am really askin[illegible] you.

A Yes, this is the reason it has evolved.

Q All right, Doctor.

A It is evolving, rather.

Q Doctor, did you have the hospital record with regard to the rhizotomy at the time you examined Mr. Chiarello?

A Yes.

Q And, Doctor, what was, in Mr. Chiarello's case, this rhizotomy being performed for? What purpose?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A I can't give you why it was performed. I can give you the reason that the doctor was performing it. Is that what you want?

Q Yes.

MR. SCHULTZ: May I respectfully object, your Honor?

THE COURT: Overruled.

A Do you have the records?

Q I didn't know you had it with your records. Pardon me.

A Maybe it's on here.

Q I have it, Doctor. You don't have to go hunting around. Here you go (handing).

A He was admitted by Dr. Giulanti. I think this may be a discharge summary -- yes, a discharge summary. Do you want me to read it?

Q I asked you one simple question, Doctor. It was what was this operation being done for?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I don't know what it was being done for, but I can tell you the reason Dr. Giulanti did it.

Q Fine. Tell us.

A He entered this time for a facet rhizotomy by radio frequency control. He had chronic intractable right leg and back pain.

Q What does that mean, Doctor?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A It means pain in his back, pain in his leg which is persistent.

Q What does "intractable" mean, Doctor?

A Present all the time, unrelieved.

Q Unrelieved by what, Doctor?

A Anything.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Objection sustained. Go ahead and read it. Let's get through with this, Mr. Lassoff. It is ten minutes to five. You have been going 50 minutes. Half is really unnecessary.

Q All right.

THE COURT: He hasn't answered your question. Do you want an answer?

MR. LASSOFF: Yes, I do.

THE COURT: He wants to know why the doctor did it. You said you could tell us.

A He said -- he doesn't say why he did it. He just said why he was admitting him. He said a patient who had chronic intractable right leg and back pain previously had a lumbar laminectomy and discectomy, which is an error.

Q Doctor, as an orthopedic surgeon, isn't it apparent that it was done to relieve the pain?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Well, he says he had a laminectomy and discectomy. That's what the reason it looks like he says here, but I am not sure that this is the doctor that even did it.

Q If you would, assume that he did do it. We have

testimony he did it.

A Assuming he did it, these are the reasons he did do it.

Q Would there be any reason except to relieve pain, Doctor?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I have no other reason he would do it for.

Q What other reason would you do a rhizotomy?

A I wouldn't do it. You are asking me why he is doing something. I cann't answer for this man.

Q Is a rhizotomy an accepted medical practice for the relief of pain, intractable pain?

A It is an experimental process that they are doing for the relief of intractable pain.

Q Is a rhizotomy destruction of certain nerve fibers so that pain will not travel along them?

A Yes.

Q And is this a radical procedure?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not radical, no.

Q Is it an extreme device to overcome pain?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q In your opinion, Doctor, is this a step that you would take lightly?

THE COURT: That who would take lightly, the doctor or the patient?

MR. LASSOFF: The doctor.

THE COURT: He said he wouldn't take it.

Q When Mr. Chiarello was discharged following the rhizotomy, would you read us the final diagnosis?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A The patient was immediately pain free, is that what you want?

Q That is not the final diagnosis, Doctor. Look at the final diagnosis.

A Intractable back and leg pain.

Q Is there another word before intractable, Doctor?

A Not on this report.

Q That meant, did it not, Doctor, that even after the rhizotomy Mr. Chiarello continued to be in pain?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. SCHULTZ: How would this doctor know?

THE COURT: Overruled. He is a surgeon. He has

been put on the stand as an expert. He deals with hospital reports I assume every day of his practice. He is in a posit'on to interpret the f'nal diagnosis.

MR. SCHULTZ: That isn't what it said.

THE COURT: I overruled your objection.

THE WITNESS: Would you read it back?

(Question read)

Q I am just asking you about the final diagnosis, Doctor.

A That is not what your question was, sir.

THE COURT: He is reframing it.

Q I am reframing it. When he was discharged he was in pain, was he not?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Not according to the records, sir.

Q The record doesn't say intractable back and leg pain on final discharge?

A You said when he was discharged he was still having pain. You didn't ask me what the final diagnosis was. The record says he was immediately pain free and was discharged.

Q Would you read after -- that's right after the operation. Would you read the discharge on October 5, please?

THE COURT: What is the date of that entry?

Q It is October 3rd, is it not?

A October 7, '74.

THE COURT: It says October 7th.

Q Are we looking at the same place at the same time, Doctor?

A Discharge.

MR. SCHULTZ: Can we have a concession that the doctor was reading properly?

THE COURT: He is looking to find out.

MR. SCHULTZ: He has looked at it.

THE COURT: Mr. Schultz, would you please do me a favor and sit down until we clear up this matter which is now being cleared up up here? All right. Thank you.

What is the date of entry he was reading?

MR. LASSOFF: I believe he was reading from an entry of October 7th, your Honor.

THE COURT: What is the date of the prognosis?

MR. LASSOFF: May I withdraw that, your Honor? Where is the date on that, Doctor?

THE WITNESS: This was dictated on the 7th of October, 1974. It was transcribed on the 8th of October, 1974.

Q Doctor, the patient was discharged from the hospital October 5, 1974, wasn't he?

A Yes.

Q And the entry you are referring to is the entry in the hospital record that's made immediately after the operation where the surgeon says the patient was immediately pain free, is that not correct?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A No, that is not correct. What I am referring to is what's commonly called a discharge summary.

Q But I didn't ask you to refer to a discharge summary.

A You did.

THE COURT: You asked him to refer to that page and he is now telling you that's the discharge summary.

Q Doctor, would you look at the operating report and reading following procedure, the bottom of the page, following the procedure.

A On the operative report it says, "Following the procedure the pain was gone except for the ache in the patient's back. He was then transferred by a stretcher back to his room."

Q And that operation was performed on October 3, 1974, is that correct?

A I think it was October 4th, sir. October 4th, yes.

gw/lf Bird-Cross 590

Q And the final discharge entry on the first page of that record, on October 5th, it states intractable back and leg pain, does it not?

A That's right.

Q Doctor, following the rhizotomy Mr. Chiarello has testified that he continued to have chronic back and leg pain and that he eventually was again admitted to the hospital for a further myelogram. Can you tell us as an orthopedic surgeon after a rhizotomy, what would you do a myelogram for?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A If it were done, I would suspect that it was done to see if there was any other reason, in other words, another bulging disc or some other form of pathology or something in the spinal cord where the prior surgery had been done.

Q Doctor, you are not a neurologist, are you?

A No.

Q Neurology and neurosurgery are two separate fields of medicine, are they not?

A Yes.

Q And both of those deal basically with the nerves and the nervous system and the spinal canal and brain?

A That's correct.

gw/lf Baird-Cross 591

Q Doctor, assume, if you would, that what Mr. Chiarello has at that level, L4-L5, is scarring and adhesions and that is creating pain. What, if any, remedy do you have to suggest to Mr. Chiarello for that pain?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. SCHULTZ: This doctor has testified in his opinion he couldn't state whether there is scarring --

THE COURT: Let him give the answer, not you, Mr. Schultz. Sit down. You are not testifying. The doctor is.

MR. SCHULTZ: I respectfully object, your Honor.

A I feel that I wouldn't suggest anything further. There is nothing that I would offer him that I feel would help him. This is why I felt he had reached maximum medical improvement when I saw him in February, '75.

Q Medically you are saying whatever he has he is going to have to live with?

A On a physical basis. I am not concerned with the nonphysical.

Q Doctor, besides the rhizotomy -- withdraw the question.

In your opinion, Doctor, would a spinal fusion help him?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I don't think so. This is not that type of case that you would do a spinal fusion for. There is no gross instability because there is no change, gross change, in the disc spacing, there is no change, as shown by the later X-rays, of the joints, the posterior joints, at those levels. I don't think a fusion would be of benefit to him.

Q In your opinion, Doctor, would Mr. Chiarello's complaints of marked severe pain be caused by scarring which could not be remedied by operation?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A In my opinion, no. I think that a lot of his complaints are not based on physical causes or what we call organic causes.

Q You are saying that despite a myelogram and an operation which revealed marked adhered scarring and fraying and the later myelogram which showed a defect once again at L4 and L5, is that what you are saying?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A Yes.

THE COURT: That's what he's saying.

Q Doctor, did you ever hear of an operation called a cordotomy?

A Yes.

Q What's that?

A This is where --

THE COURT: He said nothing more could be done. I don't see any reason for dragging in other types of procedures which the jury hasn't heard of at five o'clock at night which nobody suggests should be done, your doctors or defendants' doctors.

Q You have not examined Mr. Chiarello since February of '75, is that correct?

A That's correct.

Q And you are not a neurologist?

A That's correct.

Q Doctor, would a neurologist be better equipped to determine whether there is nerve root pressure and inflammation than you?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Probably not because a neurologist doesn't actually operate on the back and he is a non-operating nerve specialist. A neurosurgeon does operate on the back. He would be better qualified than a neurologist. An orthopedic surgeon who does

operate on the back would be better qualified than a neurologist.

Q To determine whether or not there is a nerve damage?

A Yes.

MR. LASSOFF: Thank you, Doctor.

THE COURT: Any redirect?

MR. SCHULTZ: No, sir.

THE COURT: Thank you. You may step down.

(Witness excused)

THE COURT: See you ten o'clock tomorrow morning.

(Adjournment to 10:00 a.m., March 9, 1976.)

gw/lf

THOMAS J. CHIARELLO and
ANGELA CHIARELLO

vs.

73 Civ. 2962
75 Civ. 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD

March 9, 1976
10:15 a.m.

(Jury present)

THE COURT: You may proceed.

MR. SCHULTZ: Mr. Girdwood.

H E N R Y D. G I R D W O O D, a defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHULTZ:

Q Mr. Girdwood, please keep your voice up so that I can hear you down here and in that way the jurors will be able to hear you. Will you do that, sir?

A Yes, sir.

Q Mr. Girdwood, would you be good enough, sir, to tell us where you live?

A 268 Davis Avenue in Kearney, New Jersey.

Q Would you be good enough to tell us with whom you reside?

A My wife and children.

Q How many children do you have?

A Four boys.

Q On or about June 30, 1972, what was your occupation?

A Bus driver for Domenico Bus Company.

Q Did you have any other occupation?

A Yes, sir. I drove a truck.

Q Sir, what is your present occupation?

A Driving a truck.

Q What kind of trucks do you drive?

A Tractor trailer.

Q Sir, for how long a period of time have you been driving buses and trucks?

A About 20 years, sir.

Q Now, sir, what were your hours when you were working for Domenico Bus Service on or about June 30, 1972?

A About six in the morning until nine in the morning and from 4:30 in the afternoon until about seven in the evening.

Q Would you tell this Court and jury, please, the routes or the runs that you made with this bus?

A Picking up in the Port Authority Bus Terminal, New York City, in the evening going through New Jersey and into Staten Island and dropping off in Staten Island on Forest Avenue, Jewett Avenue, Hylan Boulevard.

Q In the morning, sir?

A And in the morning picking up in those same streets in Staten Island and going through New Jersey and into the Port Authority Bus Terminal in Manhattan.

Q Sir, what type of passengers did you accommodate in that bus?

A Commuter.

Q Commuter bus, commuter passengers?

A Yes.

Q What kind of bus were you operating on June 30, 1972?

A 51-passenger General Motor Coach, city bus.

Q What time of the day did this accident occur?

A Between 6:00 p.m. and 6:30.

Q Sir, where had you left or departed from prior to this accident occurring in the evening?

A Port Authority Bus Terminal in Manhattan.

Q What time did you leave, if you know?

A About 5:05.

Q And, sir, did there come a time when you approached the vicinity of the Bayonne Bridge?

A Yes, sir.

Q Along what roadway were you operating this bus before you approached this bridge.

A Kennedy Boulevard.

Q Sir, is there at Kennedy Boulevard an access road or whatever you may want to call it that goes to the bridge?

A Yes, sir.

Q And, sir, what were the weather conditions say for approximately a half hour before this occurrence took place?

A Heavy rain.

Q And, sir, at the time of the actual occurrence, was it raining or not?

A No, sir.

Q How long before the occurrence took place had it ceased raining?

A I really don't know. About a half hour, I imagine. About a half hour, fifteen minutes.

Q Now, sir, when you were on Kennedy Boulevard, you say --

A Yes, sir.

Q -- would you tell this Court and jury what steps you had to take in order to get onto the access road to the Bayonne Bridge?

A Stop at a traffic light, cross an intersection and proceed at a slight right-hand turn slight angled right turn to go down an approach ramp.

Q And, sir, do you know whether you stopped at that traffic light or not?

A Yes, sir, I did.

Q How far is this traffic light from the actual scene of this occurrence, the point of the impact, your best estimate?

A Maybe a couple of thousand feet.

Q Now, sir, you have told us that this is an approach ramp or -- would you describe it as a ramp or access road?

A An access road.

Q Now, sir, would you describe the roadway conditions? By that, was it dry or wet on this access road?

A It was wet.

Q And, sir, how many lanes was this access road?

A Two lanes.

Q Now, sir, would you describe this access road from the time you got on it to the point of impact? Would you tell this Court and jury how it's constructed, it's terrain and what you saw there?

A It's underneath a railroad trestle, and the trestle is ten tracks wide.

Q Before you get to this railroad trestle, can you tell the Court and jury how many lanes there are for traffic moving in the direction you were moving going towards the trestle?

A Two lanes wide and a slight right-hand curve. And

then it curves to the left again and becomes straight underneath the overpass.

THE COURT: Underneath the overpass, is that the trestle?

THE WITNESS: The trestle, yes, sir.

Q Before you get to this trestle, can you tell us, sir, whether this roadway is level, uphill or downhill, before you get to the trestle?

A No, it's a downgrade.

Q Can you tell us your best estimate, sir, as to the percentage of the grading going downhill, if you know?

A 20, 25, 30 degree.

Q Sir, underneath the trestle on that morning or that afternoon, rather, that evening, can you tell us, sir, what is the terrain underneath the trestle? Is it level or what?

A It's level but cambered to the curb. It's level, the distance underneath the railroad trestle itself, but it comes down and then comes up on the other side but cambers to the curb.

Q How long is the roadway underneath that trestle, your best estimate?

THE COURT: You mean from the time it ends under the trestle to the time it comes out?

MR. SCHULTZ: Yes.

THE COURT: He said ten tracks wide.

MR. SCHULTZ: I want to know what that is in feet, if I may.

A Roughly a hundred feet.

Q Sir, after this 100 feet, what does the roadway do then?

A Upgrade and turns to the right; graduates to the right.

Q Sir, on that evening was it daylight, dark or what? What was the lighting condition?

A Daylight.

Q Sir, what did you observe under the trestle that evening?

A A puddle was there. It's always flooded.

Q Sir, for how long a distance was this flooded condition under this trestle, your best estimate?

A About 30 feet.

Q And how deep was this water?

A About eight, nine inches, ten inches.

Q Now, sir, as you came down this incline to get to the bottom part of the trestle, was there any traffic in front of you?

A Yes, sir.

Q How close was the nearest car in front of you?

A About 75 feet.

Q And, sir, was there any traffic in back of you?

A Yes, sir.

Q Was there any traffic to your left or right -- first to your left. Was there any traffic to your left?

A Yes, sir.

Q What was to your left?

A Another vehicle.

Q Where was this vehicle?

A On my left rear wheel.

Q Was it proceeding in the same direction as you?

A Yes, sir.

THE COURT: This access road you are on that goes under the trestle, is that a one-way road?

THE WITNESS: It's one way in the direction I was going, with two lanes in the one direction.

THE COURT: Two lanes in the one-way direction, one-way traffic on the way to the Bayonne Bridge?

THE WITNESS: Yes, but there are two lanes on the other side.

THE COURT: Not in the area you are?

THE WITNESS: No.

THE COURT: Start over again. The road you were on

that went under the trestle, was that a one-way traffic or two-way traffic?

THE WITNESS: One-way traffic.

THE COURT: Go ahead.

MR. SCHULTZ: May I have the last question, please, Mr. Reporter, that I put to him.

(Question read)

Q Sir, that vehicle we just were speaking about, where was that vehicle?

A To my left, on my left rear wheel.

Q Sir, as you were going downgrade before you reached this flooded condition, how fast was your vehicle going?

A About 20 miles an hour.

Q Sir, I show you this picture and I ask you, sir --

THE COURT: Have it marked for identification.

MR. SCHULTZ: Yes, sir.

xxx (Defendant's Exhibit B marked for identification.)

Q Sir, I show you this picture and I ask you, sir -- this is Defendant's Exhibit B -- and I ask you, sir, does it show the area of the roadway near the scene of this occurrence and does it accurately portray that roadway and the signs as it existed on June 30, 1972?

A Yes, sir.

MR. SCHULTZ: I offer it in evidence.

MR. LASSOFF: May I see it, your Honor.

THE COURT: Yes.

(Handed to Mr. Lassoff)

MR. LASSOFF: May I have a voir dire on this, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. LASSOFF:

Q When was this photograph taken, Mr. Girdwood?

A When was that photograph taken?

Q Yes.

A I have no idea, sir.

Q You recollect having testified on a prior occasion that you had not seen any signs on this bridge and that you were not familiar with any speed limit?

A No, I didn't say that, sir.

Q You didn't say that.

MR. LASSOFF: I have no objection to the photograph.

xxx (Defendant's Exhibit B received in evidence.)

THE COURT: In order to get an idea of what this represents, Mr. Schultz, will you ask the witness to indicate where the accident occurred on that photograph?

MR. SCHULTZ: I will ask him to show where the accident occurred.

Q Does this picture show where the actual impact took place?

A No, sir.

THE COURT: What does it represent? Then I don't know what it represents.

MR. SCHULTZ: If your Honor please, I will ask him one more question and then perhaps it will.

Q Sir, can you tell me, did the point of impact take place before where this picture is depicted?

A Yes, sir.

Q How far before where this picture is depicted did the point of impact take place?

A About 25, 50 feet.

THE COURT: Then I gather this picture is beyond where the impact took place going toward the Bayonne Bridge, is that it?

THE WITNESS: Yes, sir.

THE COURT: What is its relevance?

MR. SCHULTZ: The relevance is it has the speed limit on the signs.

THE COURT: That is beyond the point of impact.

MR. SCHULTZ: 25 or 50 feet, Judge.

THE COURT: Sustained.

MR. SCHULTZ: If your Honor please --

THE COURT: I have sustained the objection.

Q Sir, what was the speed limit at the point where the impact took place?

MR. LASSOFF: Objection to the form of the question unless it specifies at the time of the accident.

THE COURT: Overruled.

MR. SCHULTZ: At the time of the accident.

A 25 miles per hour.

MR. SCHULTZ: If your Honor please, I am going to offer this again to show the signs and the speed limit, if your Honor please.

I will ask him one more question, sir.

Q Does this picture, sir, indicate the point where there was a -- withdrawn.

I will get to it.

Mr. Girdwood, you told us there was a flooded condition underneath the trestle, is that correct?

A Yes, sir.

Q And, sir, when you were going down the grade to the trestle, was there another car in front of you?

A Yes, sir.

Q Did you later identify that car as being the car driven by Mr. Chiarello?

A Yes, sir.

Q How far in front of you was that car?

A About 75 feet, sir.

Q And, sir, did he maintain that distance while going through this flooded condition?

A Yes, sir.

Q Sir, did there come a time when Mr. Chiarello brought his vehicle to a stop?

A Yes, sir.

Q How far from the point where the roadway begins to go up underneath the trestle did Mr. Chiarello bring his vehicle to a stop?

MR. LASSOFF: Objection, your Honor. We have had no testimony of the roadway going up after the trestle.

THE COURT: Everybody knows the roadway --

MR. LASSOFF: I agree, but this witness has not said so.

THE COURT: It is a fact in the case. Are you disputing those facts?

MR. LASSOFF: No, sir.

MR. SCHULTZ: I will ask him. I did ask him.

THE COURT: Why waste time. Let's go on. It's admitted by everybody that this roadway went up after it left the trestle. A slight grade is what the plaintiff said.

MR. SCHULTZ: This witness said so.

THE COURT: Ask him the next question.

Q How far beyond where the roadway began to go up did Mr. Chiarello bring his vehicle to a stop?

A 25 to 30 feet.

Q Now, sir, when you saw Mr. Chiarello's vehicle come to a stop, where did it come to a stop after the point where it began to go up, actually come to a stop?

A In the middle of the roadway.

Q How far beyond the point where the roadway went up did he actually come to a stop?

MR. LASSOFF: Objection, your Honor. He was already asked and answered the question.

THE COURT: Overruled.

A Would you ask me that again, please? I am not sure what you mean.

Q I want to know where it was he brought his vehicle to a stop, actually brought it to a stop, with relation to the point where you started to go up.

THE COURT: He has already answered that. 25 to 30 feet.

A From the bottom of the grade, sir --

THE COURT: The question you answered before is the plaintiff stopped about 25 to 30 feet after the roadway started to go up.

MR. SCHULTZ: I want to ask him if that's correct.

THE WITNESS: It goes up in two places.

Q When you say it goes up in two places, will you tell the Court and jury what you mean?

A There is a slight grade and the road straightens and then starts to go up again.

Q Where did he bring it to a stop, how far from the actual collection of the water did he bring -- the water under the trestle -- did he bring his vehicle to a stop?

A About 150 feet.

Q Now, Mr. Girdwood, how far is that picture from the point where Mr. Chiarello brought his vehicle to a stop?

MR. LASSOFF: Objection, your Honor. It's already been asked and answered by you.

THE COURT: That's right. He has already said before it was 25 to 50 feet beyond that point.

THE WITNESS: This side of the photograph, your Honor.

THE COURT: I said that picture, according to your testimony, was taken 25 to 50 feet beyond the point of the impact.

MR. SCHULTZ: No, it's before the point of the impact.

THE COURT: He said beyond.

Is that true? You asked him whether he could see the point of impact on there and he said no, because the impact occurred before the place where that picture was taken.

MR. SCHULTZ: That's right, before it, not beyond it.

THE COURT: The photograph is beyond the point of impact.

MR. SCHULTZ: Yes, 25 or 50 feet.

THE COURT: That's right.

MR. SCHULTZ: Now, I will offer it for the purpose of establishing the speed limit. It doesn't change in 25 or 50 feet.

THE COURT: I sustained an objection.

MR. SCHULTZ: I respectfully except, your Honor.

Q Now, Mr. Girdwood, in front of Mr. Chiarello's car, was there another vehicle?

A Yes, there was.

Q And, sir, did you observe what that vehicle did?

A Stopped.

Q And how far was Mr. Chiarello's vehicle from that vehicle?

A About ten feet.

Q Sir, does this picture show the point where the

vehicle in front of Mr. Chiarello's car came to a stop?

A Yes, sir.

MR. SCHULTZ: I offer it in evidence.

MR. LASSOFF: Objection, your Honor.

THE COURT: Sustained.

Q Sir, can you tell us, sir, at the point where this other vehicle which was in front of Mr. Chiarello's car came to a stop, what did you see in the roadway?

A A slight puddle.

Q For how long a distance was that puddle?

A I didn't hear you.

Q How long a distance or how big was that puddle?

A Ten feet.

Q Sir, does this picture portray where that puddle was?

A Yes, sir, it does.

MR. SCHULTZ: I offer it in evidence, your Honor.

MR. LASSOFF: Objection, your Honor.

THE COURT: Sustained.

MR. SCHULTZ: If your Honor please -- I have it marked.

Q Now, sir, what distance separated from Chiarello's vehicle from the car in front of him when he brought it to a stop?

A About ten feet, sir.

Q And, sir, when Mr. Chiarello brought his vehicle to a stop, how far was the rear of that vehicle, Mr. Chiarello's vehicle, from the front of your bus when you saw it come to a stop?

A About 75 feet.

Q What did you do then?

A Applied the brakes.

Q Where was your car at that point?

A On the upgrade, sir, behind him.

Q Had you passed through the flooded condition?

A Yes, sir.

Q At what speed were you going when you applied your brakes as you have just told us?

A About 20 miles an hour.

Q At that time, sir, where was this vehicle that you had told us was to your left rear?

A He had gone straight, sir.

Q What did your bus do when you applied the brakes, as you have told us?

A The wheels locked and the tire skidded on the wet pavement.

Q Did you attempt -- withdrawn.

Did you turn your vehicle in any way?

A Yes, sir.

MR. LASSOFF: May we have the witness stop being led at this point?

THE COURT: Ask him what happened.

Q What did you do with the wheels of your vehicle?

A When I seen the bus was starting to slide I tried to steer it over to the curb to rub the wheels up against the curb. My right wheel did strike the curb and run along it for a distance, the right rear.

Q Did your vehicle come in contact with Mr. Chiarello's vehicle?

A Yes, it did, sir.

Q What speed was your vehicle going when you came into contact with Mr. Chiarello's vehicle?

A It was almost stopped, sir. About seven or eight miles an hour.

Q When you applied your brakes, sir, can you tell us what happened with the wheels of your bus?

A The wheels locked. The wet pavement caused them to slide.

Q At the time the actual impact took place, sir, what happened to the vehicle in front of Mr. Chiarello's car? Was it moving or standing still, do you know?

A I think he was just about ready to move. I couldn't

swear on that. He was either stopped or just about ready to move off.

Q Now, sir, after the impact did Mr. Chiarello get out of his car?

A Yes, sir.

Q Will you tell this Court and jury what you observed him do?

A He got out of his car, took his ignition keys out, walked to the back of the car, inserted them in the trunk, lifted his trunk hood up, looked in to see the damage, closed the trunk, took the keys out, went back and put the keys in the ignition.

Q Sir, did you have any conversation with Mr. Chiarello?

A Yes, sir.

Q Would you tell us where that took place?

A Outside the bus, sir. I asked him if he was all right.

Q Did he come to the bus?

A Yes, sir, he did, to exchange licenses and registrations.

Q Did you observe him walk to the bus?

A Yes, sir.

Q Did you see any visible signs of injury to Mr.

Chiarello?

A No, sir.

Q What conversation did you have with Mr. Chiarello?

A I asked him if he was all right and asked him for his license and registration.

Q What did he say to you when you asked him if he was all right.

A He said, "I'm all right, shaken. Shook up." I don't remember if he said shook up or shaken. Something like that.

Q How long did he remain talking with you at the bus, sir?

A Before we were moved?

Q Yes.

A About five, ten minutes.

Q Did police officers come to the scene?

A Yes, sir.

Q Did Mr. Chiarello have any conversation with the police officers?

A Yes, sir.

Q Did you hear that conversation?

A Yes, sir.

Q Can you tell us what Mr. Chiarello said?

A He said he didn't need any assistance, he was

all right, he didn't have to go to the hospital or didn't want to go to the hospital.

Q Sir, what did you observe Mr. Chiarello do then after he left the bus?

A He walked back to his car, that is, went back and sat in his car until we pushed it off.

Q Did you see him pushed off?

A I had to. He was in front of me.

Did you see Mr. Chiarello again that day?

A Yes, sir, when they pushed his car to the other side of the bridge.

Q Did you talk to him again then?

A I don't remember.

Q Did you have any other conversation with Mr. Chiarello? Did you say anything else?

A No, other than I am sorry the accident happened.

Q Now, sir, are you one of the defendants in this action?

A Yes, sir.

MR. SCHULTZ: If your Honor please, I am going to reoffer this exhibit.

THE COURT: I renew my rulings. It is the fourth time you have offered it and the fourth time I have ruled.

gw/lf Girdwood-Direct 617

MR. SCHULTZ: May I state for the record, please?

THE COURT: No. At the side bar you can but not in front of the jury.

MR. SCHULTZ: All right.

(At the side bar)

MR. SCHULTZ: If your Honor please, this is a picture which the witness last stated depicts the actual point --

THE COURT: I don't understand the point of the accident.

MR. SCHULTZ: Just one moment, sir. He states the actual point of the accident is about 25 feet --

THE COURT: 25 to 50 feet.

MR. SCHULTZ: -- before when the scene of this occurrence is. He also stated this is the point where the collection of water was where the other vehicle was stopped.

MR. LASSOFF: Which is impossible, your Honor.

MR. SCHULTZ: If your Honor please, the picture is being offered to establish the signs, the location of the roadway and the speed limit. If your Honor please, it seems incredible to me to state that in order to prove the speed limit you have to have a sign exactly at the point --

THE COURT: No, but you have to have it before the point of impact. A sign giving a speed limit there means

beyond the point. It doesn't mean it existed before that point. That's why it is ruled out.

MR. SCHULTZ: Respectfully except, your Honor.

(In open court)

Q Mr. Girdwood, how many times do you drive that route -- did you drive it before this occurrence?

A Twice every day, sir.

Q Sir, were you familiar with the speed limit on that access road?

A Yes, sir.

Q And, sir, would you tell this Court and jury what the speed limit was at the exact point --

THE COURT: He has already answered that question before in response to your question.

MR. SCHULTZ: May we have it again?

THE COURT: There is no point going over it again.

MR. SCHULTZ: None, sir?

THE COURT: None.

MR. SCHULTZ: You direct --

THE COURT: I do. It's a waste of time. It's in the record.

MR. SCHULTZ: I respectfully except.

Q Mr. Girdwood, on prior occasions, did you have an occasion to be in the vicinity of that trestle either

during or after rainstorms?

A Yes, sir.

Q Would you tell this Court and jury what condition you found under that trestle on these prior occasions after rainstorms?

MR. LASSOFF: Objection, your Honor.

THE COURT: Overruled.

A Every time it rains, sir, the rain runs down this thing and it fills up with all the muck from the park and loose garbage and blocks the sewers up and it floods.

Q Sir, was this area flooded at the time of this occurrence?

A Yes, sir.

Q When your bus went through this puddle, could you tell us how high the wheels of the bus are? What is the height of the wheels?

MR. LASSOFF: May we have these questions be asked without the defense attorney indicating with the hands the height of the wheels?

MR. SCHULTZ: If your Honor please, I did not indicate the height of the wheels and I respectfully except, your Honor.

THE COURT: You were indicating a height.

MR. SCHULTZ: I was indicating the measurement that

I wish him to take.

THE COURT: I gather he understands the English language and understands what it means when you say height of the wheels.

Q How high are the wheels, Mr. Girdwood?

A From the ground to the rim, about ten inches. The wheels are 22 inch wheels.

Q Mr. Girdwood, where are the brake drums on those wheels?

A Right above the rubber tire in the back, inside the wheel.

THE COURT: Did you want to say something?

THE WITNESS: No, sir. I was going to say in back of the drum.

Q In back of what?

A The brake drum which is the center of the wheel.

Q How far did your car travel, if you can tell us, after you put the brake on up until the point of the impact?

A About 70, 75 feet.

Q Now, Mr. Girdwood, you testified on prior occasions, did you not?

A Yes, sir.

Q Sir, did you meet with me yesterday afternoon during the luncheon recess?

A Yes, sir.

Q Did we discuss this matter?

A Yes, sir.

Q Did you meet with me this morning?

A Yes, sir.

Q Did we discuss the matter?

A Yes, sir.

Q How long did we meet this morning?

A About a half hour.

Q Sir, did you have in your possession a transcript of your previous testimony?

A Yes, sir.

Q Did you read it?

A Yes, sir.

Q Incidentally, Mr. Girdwood, what is your education?

A I was educated in Great Britain, sir.

Q How far did you go in Great Britain?

A Up to high school, graduated high school.

MR. SCHULTZ: I have no further questions.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. LASSOFF:

Q Mr.Girdwood, until you passed the trestle, is the boulevard you are driving on part of Hudson Boulevard?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A I don't know, sir. I don't know if Hudson Boulevard continues through on the other side of that or not. I am not sure if it is Hudson Boulevard or not.

Q Isn't it a fact when you come out of the trestle that is when you are on the access road to the bridge, before that you are on Hudson Boulevard?

A Hudson Boulevard ends there right at the bridge, right --

Q At the trestle?

A Yes, sir.

Q So until you passed the trestle you are on Hudson Boulevard and not on the access road to the bridge, is that correct?

A You mean on the downgrade?

THE COURT: Let's get a couple of things straight. I think there is a difference between an ordinary person's explanation of access road and a technical one.

When you speak of Hudson Boulevard and access road, I assume you are drawing a distinction between the jurisdiction of the city of Bayonne on one side and the Port Authority on the other?

MR. LASSOFF: Yes, your Honor.

THE COURT: Are you aware of where the City of Bayonne's jurisdiction ends and the Port Authority's jurisdiction begins?

THE WITNESS: I think so, sir. I think it's that part of the trestle.

THE COURT: Halfway under the trestle?

THE WITNESS: Yes, sir.

THE COURT: The way you go through the tunnels down here you have New Jersey and New York?

THE WITNESS: Yes, sir.

THE COURT: He will split the trestle in half. One-half belongs to Bayonne and the other to Port Authority.

Q So halfway through the trestle, that roadway would be governed by the speed limit of the City of Bayonne, is that correct?

A Yes, sir.

Q And the signs that Mr. Schultz asked you about are on the access road of the bridge itself which would be governed by the Port Authority, is that correct?

A Yes, sir.

Q Now, isn't it a fact, sir, that on that Hudson Boulevard entrance before you come to the Bayonne Bridge that roadway is posted for 20 miles per hour?

A No, sir.

Q It is not?

A No, sir. It is posted to 25, sir.

Q Is there a sign before you come to the sign you were looking at before?

A Yes, sir, on the boulevard, all along.

Q Sir, prior to your reaching the trestle, what speed were you going?

A The same as the flow of the traffic, about 25 miles an hour.

Q Do you recollect having testified, and I read this question and answer:

"How fast was your motor vehicle traveling prior to reaching the railroad trestle and the dip under the railroad trestle?

"A It was about the same speed as the rest of the traffic, about 25 miles an hour, 30 miles an hour."

A I will go with that, yes, sir.

Q Would you accede, if you knew that the speed limit was 25 miles an hour, would you be going at 30 miles an hour, sir?

A I was just keeping up with the flow of traffic. I don't think I was going any faster than that.

Q And you say that the road was posted for 25 and you were going 25 to 30?

A 25, possibly 30, sir. I don't know if I was doing 30.

Q And at the time you were doing this speed, you knew there had been a heavy thunderstorm?

A Yes, sir.

Q And that the roads were wet?

A Yes, sir.

Q And that there was a flooded condition underneath this trestle?

A Yes, sir.

Q Some -- incidentally, hadn't you previously testified that that flooded area under the trestle was 25 feet wide or long, 25 feet long?

A Yes, sir.

Q Today you said it was 30 feet long?

A Five feet, I can't remember in my mind four years ago what five feet was in a puddle of water, sir.

Q This flooded area was eight, nine, ten inches deep?

A Yes. It's always that deep. It's as deep as the height of the curb.

Q Isn't it a fact, sir, that underneath that trestle the curb is cambered or tilted, pitched for drainage?

A Yes, it is.

Q And isn't it a fact, sir, that at that portion of the roadway the only sewers and drains for that entire road are located?

A Yes, sir.

Q Now, how fast did you proceed through this flooded condition some 25 to 30 feet long, some eight, nine, ten inches deep?

A I slowed down to about 20 miles an hour.

Q You recollect being asked this question and giving this answer:

"Q How fast were you moving" --

MR. SCHULTZ: Where are you reading from?

MR. LASSOFF: I will be with you in a second. Excuse me a minute, your Honor.

(Pause)

Q "Q How fast were you moving when you saw the other cars apply their brakes?"

MR. LASSOFF: Page 12, line 8.

MR. SCHULTZ: When was that testimony taken?

MR. LASSOFF: April 11, 1974.

Q "A About 25 miles an hour."

Do you remember giving that answer?

A I don't particularly remember that answer but if it's in there, I said it.

Q Are you telling us you went through a pool of water eight, nine, ten inches deep, 25 to 30 feet wide at a speed of 25 miles per hour?

A I said about 20 miles per hour.

Q You said previously 25 miles per hour?

A 25 to 20 miles an hour. I slowed down.

Q Can you tell us why these vehicles in front of you came to a stop?

A Excuse me?

Q Will you tell us why these vehicles in front of you had come to a stop?

A Because of another slight puddle further up.

Q When you say a slight puddle, how big was that puddle, deep?

A Three or four inches, two, three inches.

Q And how long?

A Ten, fifteen feet.

Q So that -- incidentally, at the time that Mr. Chiarello's car and the car in front of him came to a stop, was there another car that was proceeding slowly through that very puddle?

A Yes, sir.

Q And these cars had all slowed down and come to a stop to go through a puddle two or three inches deep but you

proceeded through a puddle ten inches deep at 25 miles an hour?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

Q I show you Plaintiff's Exhibit 10 for identification and I ask you if this photograph fairly and accurately shows the scene of the accident as it existed on June 30, 1972?

A Yes, sir.

MR. LASSOFF: I will offer it in evidence, your Honor.

THE COURT: Show it to Mr. Schultz.

THE WITNESS: With the exception of the snow.

MR. LASSOFF: With the exception of the snow. We all agree it wasn't snowing in June.

MR. SCHULTZ: If your Honor please, I had objected to this.

THE COURT: I know, but your witness now says it correctly reflects --

MR. SCHULTZ: That wasn't the basis of my objection.

THE COURT: Then come up to the side bar.

(At the side bar)

MR. LASSOFF: The smudged area is way ahead of the scene of the accident where the markings are. It has

nothing to do with the scene of the accident.

THE COURT: The last time somebody said it wasn't clear, I think the plaintiff.

MR. LASSOFF: My witness said it was smudged.

THE COURT: Your witness says it correctly reflects the scene of the accident, your driver.

MR. SCHULTZ: I objected on the basis there had been markings that have been erased.

THE COURT: That objection, that's overruled.

MR. SCHULTZ: Okay, Judge. Thank you.

(In open court)

xxx (Plaintiff's Exhibit 10 received in evidence.)

BY MR. LASSOFF:

Q Sir, does that photograph show the actual scene of the accident?

A Yes, sir.

Q Would you put in that photograph three circles representing the three vehicles involved in the accident and put a number for each of the vehicles, the car that Mr. Chiarello's was pushed into being vehicle one; Mr. Chiarello, two, and you three.

(Witness writes)

A This pen won't write on that photograph.

(Witness writes)

A At the time of the impact?

Q At the time of the impact, not where they came to a stop after the accident, but at the time of the impact.

(Witness writes)

Q Sir, in this photograph you have just marked, does this photograph also show prior to the scene of the impact an exit from the bridge for traffic that does not want to go onto the bridge?

A Yes, sir.

Q Would you mark that exit with a circle and put "exit" on it?

(Witness writes)

Q Now, at the point where the bus or the other traffic comes out of the trestle, at that point does the roadway become one lane wide?

A Directly out from under the trestle it is still two lanes. Then it becomes one.

Q Then it becomes one lane wide?

A To the bridge.

Q At the point where the accident happened, how many lanes was the roadway?

A One lane.

Q One lane wide?

A Yes.

Q Now, would you tell us the size of your bus, sir?

A About 40 feet long.

Q And how wide?

A Ten feet.

Q Would you tell us the approximate weight of your bus?

A About twelve ton.

Q Was the bus fully loaded at the time of the accident?

A Yes, it was.

Q Where did you first notice any traffic in front of you from the time you made your right-hand turn or your slight right to get onto the roadway leading to the access road to the Bayonne Bridge?

A When I just crossed that intersection? The first time I noticed traffic after I got there, they were halfway through the trestle.

Q Did they come in the same direction you did or had they made a left turn to get to this point?

A I couldn't be sure about that, sir.

Q Now, did you follow those particular vehicles from the time you made your turn until the time the accident occurred?

A Yes, sir.

gw/lf Girdwood-Cross 632

Q Just before you entered the trestle, how far in front of you was the vehicle you eventually came in contact with?

A 75, 80 feet.

Q And how fast were you going at that time?

A That's when I first went under the trestle?

A No, when you first saw the car in front of you go under the trestle.

A Oh, about 25.

Q And when you saw the car in front of you go under the trestle, did you keep it under observation as it went through this pool of water you say existed underneath the trestle?

A Sir, the cars skirt that pool of water. They don't go through it.

Q Cars don't go through the pool?

A They go around it. It is strictly in the right-hand lane up to the curb. I had a man on my left. I couldn't go around the puddle.

Q You had a guy on your left while you were in the trestle?

A When I was all the way down, yes, sir.

Q And this guy was on your left all the way through the trestle and passing the trestle and up to the point of

impact?

A No, I think he went off to Bayonne, the other part of Bayonne and I went to the bridge.

Q He had come off that exit that is shown in the photograph you just marked?

A Yes, sir, I think so.

Q And that exit is prior to the point of impact, is it not?

A Yes, sir.

Q So that at the time of the impact this man was not at your left rear wheel, he had already left the roadway?

A Yes, sir, I imagine. I wasn't looking at him.

Q So nothing was at your left at the time of the impact, was there?

A Excuse me?

Q Nothing was on your left at the time of the impact?

A Nothing except the abutment.

Q Except the what?

A The abutment.

Q Where was your bus when you first saw something which indicated to you that traffic was changing in some way?

MR. SCHULTZ: Objection.

THE COURT: I don't understand the question.

Q Where were you when you first saw brake lights of any vehicle in front of you?

A Under the trestle.

Q Incidentally, does your bus have a four and a half foot window across the width of the bus?

A Yes, sir.

Q And from the time you entered the trestle until the time this accident occurred, could you see traffic on the other side of the trestle, on the upgrade?

A Momentarily you lose sight of it if you are back far enough at the curve.

Q Are you telling us there was a blind spot in coming out of this trestle?

A Not for me because I wasn't that far behind.

Q Then did you have the vehicles in front of you under full observation at all times?

A Yes, sir.

Q So there was no blind spot?

A No, sir.

Q From the time you entered the trestle until the time you came out of the trestle, did you gain any distance on the vehicles in front of you?

A Did I gain any distance?

Q Yes. Did you get closer?

A No, sir.

Q From the time -- how far in front of you was this car you eventually came in contact with at the time you first saw the brake lights go on?

A About 75 feet.

MR. LASSOFF: Going to defendant's deposition, page 11.

Q Do you recollect giving this testimony:

"Q When did you first notice the car in front of you start slowing or stopping, if you noticed that?

"A About 50 feet in front of me when I seen the car ahead of him apply his lights first."

Do you recollect that question and making that answer?

A It's an error.

Q That answer was given in 1974. Was your recollection of the circumstances of this accident clearer in April of 1974 than it is today?

A Right now they are.

Q So that your memory would have been better in April, 1974, than it is today, is that fair?

A Yes, sir.

Q So that if you had said then when you first saw the brake lights go on that that car was 50 feet in front of

you, that would have been more likely correct than your testimony today?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

A You are losing me in this. I am getting all mixed up.

THE COURT: He has answered your question. His recollection was better in '74 than it is in '76.

Q Now, when you saw the vehicles in front of you, and I believe you testified that you saw the car in front of the car you hit lights go on first, did these cars come to a gradual stop or a sudden stop?

MR. SCHULTZ: Objection as to form.

THE COURT: Overruled.

A They came to a stop.

Q Well, how far had they traveled before they came to a stop, Mr. Girdwood?

THE COURT: After their brake lights showed?

Q After you saw their bright brake lights on?

A Some people drive with their foot on the brake. I can't say if they are stopping when the brake light goes on or they are moving. People drive with two feet. I have seen lights the whole way down the road. That doesn't mean to say that the car is stopping.

Q You saw lights the whole way down the road?

A No, I say at other times. There are different driving habits.

Q I am asking you, how far did the cars in front of you travel after their brake lights went on?

THE COURT: You know, if you don't know, don't be afraid to say it.

A I really don't know.

THE COURT: Then say so.

Q Do you recollect testifying, once again, in April of 1974 in the following manner:

"Q How far did the car in front of you travel from the time you first saw him apply his brakes until the time this accident occurred?

"A About 25 feet."

Were you asked that question and did you make that answer?

A I am sure I did, sir.

Q And would that refresh your recollection as to what had happened?

A Yes, sir.

Q Now, car number one, the car that Mr. Chiarello's car was pushed into, where did he stop with reference to the puddle that you say was two or three inches deep, ten to

fifteen feet long?

A He had stopped before the puddle.

Q Before the puddle?

A Yes.

Q How far before the puddle?

A Right at the puddle.

Q How long had he been stopped before Mr. Chiarello's car came to a stop?

A Seconds.

Q How many seconds?

A I don't know, sir.

Q But it was seconds, plural?

A Yes.

Q Now, how soon after -- withdraw the question.

Where did Mr. Chiarello's car come to a stop behind this car that you said had been stopped for seconds?

A About ten feet, sir.

Q And how long was he stopped before your bus came in contact with his car?

A Just seconds, too, sir.

Q Plural, seconds?

A Yes.

Q So that the car in front of Mr. Chiarello and Mr. Chiarello's car were both stopped for seconds before

this accident?

A Yes, sir.

Q At the time Mr. Chiarello's -- withdraw the question.

Incidentally, when you entered the area of the trestle you said that Mr. Chiarello's car was 75 feet in front of you?

A Yes.

Q When you came out you testified in a deposition in '74 that he was 50 feet in front of you?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

Q So that would it be fair to state if you had gained one-third of the distance between the two cars, the cars in front of you were only going two-thirds of the speed you were going?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

A No, sir.

Q Did you move your car in any way from the time you saw the bright lights go on until the time the accident happened?

THE COURT: Bright red lights?

MR. LASSOFF: Brake lights.

A Did I move it in any direction?

Q Yes, sir.

A I tried to steer -- when I seen it wasn't going to stop, I tried to bring it into the curb.

Q Do you recollect being questioned in 1974 once again and having been asked these questions and giving these answers:

Page 13, Mr. Schultz.

"Q At any time before the accident occurred, did you attempt to change lanes or to change direction of your bus in any way?

"A Yes, I did not change lanes but I did look at my mirror to see if I could get over past him on the left when I was starting to apply my brakes and I seen the slippery condition and I looked in my mirror and the guy was still hugging my left rear wheel.

"Q So at no point from the time you first saw the cars in front of you apply their brakes did you change lanes?

"A No, sir.

"Q What part of your bus was in contact with Mr. Chiarello's car?

"A The front bumper.

"Q Where did you strike Mr. Chiarello's car?

"A On the rear.

"Q Straight on from the front to the rear?

"A Yes."

Do you recollect being asked those questions and making those answers?

A Yes, sir.

Q Would that refresh your recollection as to whether or not you changed lanes in any way prior to this accident?

A No, I didn't change any lanes.

THE COURT: He never claimed he changed lanes.

A I had no --

THE COURT: Wait. He never changed, he claims, lanes. What you read is not inconsistent with the testimony.

Q Mr. Girdwood, when you were driving on this highway, the highway was wider than the width of your bus?

A Yes.

Q Were you riding next to the curb or in the middle of the highway?

A I was in the middle of my lane.

Q How much space was there either to your left or your right prior to your attempting to do something with your bus?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. SCHULTZ: May we have the point where this is

taking place? The roadway at one point is two lanes and another point it is one lane.

THE COURT: He is talking about when he decided to try to move over to run his wheels against the curb.

MR. SCHULTZ: It wasn't clear to me from the question, your Honor, where he was.

THE COURT: There is no point of trying to move over before he saw the red lights go on, Mr. Schultz.

MR. SCHULTZ: I respectfully except.

THE COURT: Now put your question again because too much colloquy has taken place.

Q Mr. Girdwood, how much space was there from the side of your bus that you wanted to move over to the curb before you moved over?

A To the right?

Q Whichever way you were moving.

A I couldn't take evasive action to the left because of the vehicle on my left. The only choice I had was to try to bring it into the curb. There was only a foot between my wheels and the right-hand curb.

Q Mr. Girdwood, did you testify just a few minutes ago that this car had already exited from the Bayonne Bridge before this occurred?

THE COURT: No, he said point of impact.

A This particular --

THE COURT: Wait. Don't be in a hurry.

Your question to him was had the car left the lane at the time of impact. Obviously it had to have left by the time of impact because the point of impact is only one lane wide.

Why don't you ask him what the distance was behind the point of impact that the lane the car was in veered off.

Q Mr. Girdwood, can you answer that question?

A This is between me and Mr. Chiarello's car?

THE COURT: You first see Mr. Chiarello's car with the brake lights on, you say, 150 feet ahead of you, I think - 75 feet ahead of you, right?

THE WITNESS: Yes, sir.

THE COURT: Plaintiff stopped 150 feet from the trestle. So when you were going in the trestle the plaintiff's car had already stopped 150 feet ahead of you, you said on direct examination here today?

THE WITNESS: Yes, sir.

THE COURT: Between that trestle point and the point where the plaintiff's car stopped, where was the turn-off for the second lane of traffic? You came under the trestle with two lanes of traffic.

THE WITNESS: Just about a bus and a half length.

THE COURT: You mean the two lanes that existed prior to the trestle narrowed down to one and a half lanes going through the trestle?

THE WITNESS: Still two lanes going through the trestle.

THE COURT: Now you are through the trestle, you are beyond the water, you are starting upgrade beyond the trestle. From that point forward how many feet is there to the turn-off for the second lane on your left? One lane goes straight ahead to the bridge and one goes to the left.

THE WITNESS: I'd say maybe eighty feet.

THE COURT: 80 feet. All right.

Was that 80 feet before the impact?

MR. SCHULTZ: Objection, if your Honor please, to the form.

THE COURT: Overruled.

A Yes, that was 80 feet before the impact.

Q So that at the time the brake lights went on, which you say was either 50 feet or 75 feet in front of your vehicle, this car would have already reached the exit from the highway to go to Bayonne?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A When I was into the turn there was no other way

I could go. I could have jumped a small concrete divider, very low, about three or four inches, when I seen the bus wasn't going to stop. The only chance I had was to look to the left. There was still a vehicle to my left.

Q When did you see the bus wasn't going to stop?

A When I applied my brakes.

Q Your brakes worked, didn't they?

A Yes,but the wheels skidded on the wet roadway.

Q So there wasn't anything wrong with your brakes, it was the wet condition of the road that caused the skid, not your brakes?

MR. SCHULTZ: Objection.

THE COURT: I will sustain objection to the question. Don't argue.

Q You say your wheels locked?

A Yes, sir.

Q That means that your brakes worked?

A Yes.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

Q So that if you slid it was due to the wet condition of the roadway, is that correct?

A Yes.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q So that your brakes actually had nothing to do with this accident whatsoever?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q Is that correct?

A If you say so.

THE COURT: No. He is asking you.

A I don't say that, no.

THE COURT: You are driving the bus. You say you applied your brakes, your brakes locked and then you skidded.

THE WITNESS: Yes, sir.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Skidded or slid. You are right, he didn't use skid, he said slid.

Was it because of the brakes or because of the wetness of the roadway?

THE WITNESS: Because it was wet.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

What is the answer?

THE WITNESS: Because of the wet roadway. There are garbage on that roadway. That creates more of a slick than just wet.

THE COURT: It was the condition of the roadway, not your brakes. All right.

Q Mr. Girdwood, you are a professional driver, is that correct?

A Yes.

Q You have been driving for a living for 20 years?

A Yes, sir.

Q And you have been driving -- how long did you drive a bus for Domenico prior to '72?

A About eight years.

Q Are you driving for Domenico now?

A Yes, sir, part time.

Q You are still a bus driver?

A Yes, sir.

Q Same hours?

A Oh, no, sir.

Q What hours do you work now?

A Whenever I can, sir, between trailer runs.

Q Incidentally, was this your last run of the day?

A Yes, it was.

Q And were you late?

A No, I was late on account of this accident.

THE COURT: Were you late up to the time of the accident?

THE WITNESS: About a half hour.

THE COURT: He was a half hour late up to the time of the accident.

Q Did you ride that road every day twice a day for I think you testified several years before this accident?

A Yes, sir.

Q And were you familiar with the condition of that roadway in rainy, wet conditions?

A Yes, sir.

Q There was nothing unusual with the condition you found in that roadway on this particular day, was there?

A No, sir.

Q You knew that the roadway would be wet?

A Yes, sir.

Q You knew there would be garbage on the roadway?

A Yes, sir.

Q Incidentally, going at a speed of 20 miles an hour, can you tell us how much distance your bus would cover in one second?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

A About 30 feet.

Q And going at 25 it would be about 37½ feet, is that correct, a foot and a half per mile per hour?

A Yes.

Q You say that the vehicles in front of you, both of them, had been stopped for seconds, plural, prior to the accident?

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

Q Is that correct?

A Yes, sir.

Q Would that be two, three or more?

A I don't remember, sir.

Q At least two?

A Yes, sir.

Q Now, going at a speed of 20 miles an hour on a dry roadway, an ordinary day, how soon could you have stopped your bus?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A Going at 20 miles per hour?

MR. LASSOFF: Yes.

THE COURT: Overruled.

MR. SCHULTZ: It depends on load, nature of the roadway, whether it is macadam, asphalt, whatever it is.

THE COURT: This man is an expert driver. He is driving a bus for eight years prior to the accident, driving

this bus for eight years. He can give an opinion within what distance he can stop his bus.

MR. SCHULTZ: Sir, I think the question has to pose the nature of the roadway, sir.

THE COURT: I don't think so.

Q The roadway on the Bayonne Bridge in dry weather. Okay? The very roadway you were on in dry, good weather, going at 20 miles per hour, how fast could you stop your bus?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A About two bus lengths, 40 feet -- no, about 60 feet.

Q About 60 feet?

A Yes.

Q Does the fact that the roadway was wet make your stopping distance longer or shorter?

A That depends on the conditions of the road.

Q We are talking about the conditions at the time as they existed at the time of this accident.

A That would make it longer.

Q It would make it longer. How long would it take you to stop your bus under the conditions that existed on the day of this accident in feet?

A About 70 feet.

Q About 70 feet. And going at a speed of -- withdraw the question.

When you applied your brakes, sir, how far were you behind this vehicle?

A About 75 feet.

Q So that you did not stop your vehicle in 70 feet, did you?

MR. SCHULTZ: Objection, if your Honor please.

A No.

THE COURT: Sustained.

Q Would you, considering the circumstances that existed, consider your answer to the question again and see if it would have taken you longer to stop your bus than 70 feet?

MR. SCHULTZ: Objection, your Honor. He said 75 feet.

THE COURT: Sustained.

Q Do you recollect our going over your testimony in April of 1974 when you said that you were 50 feet behind when the brake lights went on and you said that was more likely, that your memory would have been better then?

A Yes, sir.

Q If you were 50 feet behind Mr. Chiarello's vehicle

at the time the brake lights went on, could you stop your vehicle in 50 feet?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A At 50 feet, no, sir.

Q No?

A No.

Q In addition, sir, when you saw the brake lights of Mr. Chiarello's and the cars in front of him go on, was your foot still on the accelerator or gas pedal?

A I don't remember.

Q You do drive with your foot on the accelerator or gas pedal?

MR. SCHULTZ: Objection.

THE COURT: What he does and what he did at this time are two different things.

Q Prior to the brake lights goingon on the vehicles in front of you, was your foot on your brake?

A Prior to his lights going on?

Q Yes.

A No, sir.

Q Did it take some time, some period of time, for you to apply your brakes after you saw the brake lights go on on the vehicles in front of you?

MR. SCHULTZ: Objection.

THE COURT: Overruled.

A A fraction of a second.

Q How much of a fraction?

A I have no idea.

THE COURT: Mr. Lassoff, no.

Q Prior to your applying the brakes, how much distance does your bus cover before you applied your brakes once you saw the brake lights go on on the vehicle in front of you?

A I don't know.

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q How fast were you going when you struck Mr. Chiarello's car?

A I was almost stopped, sir. About seven or eight miles an hour.

Q I didn't hear.

A About seven or eight miles per hour.

Q Do you recollect in April of 1974 being asked these questions and giving these answers:

"Q At the point where this accident occurred"--

MR. SCHULTZ: Where are you, sir, what page?

MR. LASSOFF: Page 14.

Q -- "what speed were you proceeding?

"A My wheels were completely locked at the speed of 20 miles per hour."

Do you recollect that?

A Yes.

Q Would that refresh your recollection as to how fast you were going at the time this accident occurred and you came in contact with Mr. Chiarello's car?

THE COURT: Repeat that again. Read the question again.

Q "At the point where this accident occurred, what speed were you proceeding?

"A My wheels were completely locked at the speed of 20 miles an your."

Would it refresh your recollection that at the time you hit Mr. Chiarello's car you were going 20 miles per hour?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A No, sir, I was going 20 miles per hour when I applied the brakes, when I was sliding, but I had slid 75 feet and I had to slow down.

Q You started to slide --

A Yes, sir.

Q -- the instant you applied your brakes?

A Yes, sir.

Q As a matter of fact, you started to slide before your foot was on the brake?

A No, sir.

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q You testified at one place that when Mr. Chiarello's brake lights went on you were 50 feet behind him and at another place that you were 75 feet behind him, and you have also stated it took some period of time for you to apply the brake?

MR. SCHULTZ: Objection as to the form, if your Honor please.

THE COURT: Sustained.

Q Now, when your bus came in contact with Mr. Chiarello's vehicle, what happened to Mr. Chiarello's vehicle?

A It bounced forward and hit the car in front of him.

Q How far did it bounce forward?

A Ten feet.

Q And did you observe the force with which Mr. Chiarello's vehicle struck the car in front of him?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

A No, sir. I noticed that I hit it and it went forward and struck the other car.

Q Did you observe that it struck with enough force to pierce the radiator of Mr. Chiarello's car?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q After the accident did you see that the radiator of Mr. Chiarello's car was pierced?

A Yes, sir.

Q Now, did you get out of your bus after the accident and go over and talk to Mr. Chiarello while he was seated in his car?

A I don't remember if I walked over to him or if he walked to me. It seems to me like it was a point in between.

Q A point in between. How long after the accident did you get out of your bus?

A First of all, I checked my passengers to see if everybody was all right in the bus. So I don't know how long it took me to do that.

When you did speak to Mr. Chiarello, how did he appear to you?

A Shaken.

Q Did you use another term besides shaken, sir, like

white and shaken?

A Yes, sir.

Q Now, did you have a conversation with Mr. Chiarello?

A Yes, sir.

Q Was this conversation that I am referring to prior to Mr. Chiarello coming to your bus to exchange license information?

A Yes, sir, it was outside. I asked him if he was all right.

Q What else did you say besides, "Are you all right?"

A I don't know.

Q Did you say, "I'm sorry, Mr. Chiarello. I was following too closely."

MR. SCHULTZ: Objection, your Honor.

A No, sir.

Q What did you say?

A I said, "Are you all right?"

Q Did you ever say to Mr. Chiarello, "I'm sorry."

A Yes, sir.

Q Did you ever say to Mr. Chiarello, I'm sorry I was following too closely."

A No, sir.

Q Were you following too closely?

MR. SCHULTZ: Objection.

THE COURT: Now wait a second. Do you have something there in which he said to Mr. Chiarello that, "I'm sorry, I was following too closely."

MR. LASSOFF: I have where he said he was sorry, your Honor.

THE COURT: Then you haven't the right to frame your question as though he had said this under oath before. That is the impression I have and I am sure that the jury has.

MR. LASSOFF: I didn't mean to give that impression, your Honor. I wasn't referring to any documents when I said it. I was walking around here in a circle.

THE COURT: Come on, Mr. Lassoff, you have been referring to those two documents on the lectern in front of you during your whole examination.

MR. LASSOFF: At times, yes.

Q Mr. Girdwood, you had the vehicles --

THE COURT: Let's clear up this point. When you spoke to Mr. Chiarello in addition to everything else, did you say to him you were sorry?

THE WITNESS: I said that when we were all finished. I said, "I'm sorry the accident happened."

THE COURT: "I'm sorry the accident happened."

Q Did you have the vehicle in front of you under observation at all times prior to this accident?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. We have been through this.

Q Did you watch the vehicles in front of you come to a stop?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained. We have been through that.

Q Did either of the vehicles in front of you, when they came to a stop, skid or slide in any way?

A Not that I seen, sir.

Q Did the vehicle that was going through the puddle skid or slide in any way?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Was there traffic behind you, Mr. Girdwood, and I am not referring to the car you said is on your left?

A Yes, sir.

Q Did any traffic behind you come in contact with your bus at the point where this accident occurred?

A No, sir.

Q In the photograph you have in front of you, Mr. Girdwood, Plaintiff's Exhibit 10, is there a bus stop where people wait for buses on that access road to the bridge?

A Yes, there is.

Q Would you put a circle over that bus stop and write "Bus Stop" in that circle?

(Witness writes)

THE COURT: Put a B.

Q Now, is that bus stop shown in the photograph before or after the point of impact?

A Before, sir. But I don't stop at that bus stop.

Q I didn't say you did.

A I'm sorry.

Q Incidentally, do you know what the speed limit is on the Bayonne Bridge itself?

A Yes, sir.

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Sustained.

Q Mr. Girdwood, as an experienced, professional driver, under weather conditions such as were existingat the time and place of this accident, would it be good custom and practice to drive your bus at the maximum rate permitted by law?

MR. SCHULTZ: Objection.

THE COURT: Sustained.

Q Incidentally, Mr. Girdwood, at the time the Port Authority Police came to the scene of the accident, was it

raining or was it still stopped raining?

A No, it was dry.

Q It was dry?

A Yes, sir.

Q Was there any damage to your bus, Mr. Girdwood?

A No, sir.

Q If I told you that the Port Authority Police listed a dented fender to your bus, would that refresh your recollection?

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Show him the report.

A No, sir.

THE COURT: Is it in evidence?

MR. LASSOFF: No, but he did testify, your Honor.

THE COURT: It's not in evidence?

A No, sir, there is no fenders on the bus.

THE COURT: Did you hear the answer, Mr. Lassoff?

MR. LASSOFF: Yes, I did, your Honor.

THE COURT: Next question.

Q I believe on direct examination did you say this, Mr. Girdwood, that Mr. Chiarello said he didn't want to go to the hospital?

A Yes, sir, he said that he was all right.

MR. LASSOFF: Thank you.

gw/lf Girdwood-Redirect 662

THE COURT: Any redirect?

MR. SCHULTZ: Oh, yes.

REDIRECT EXAMINATION

BY MR. SCHULTZ:

Q Mr. Girdwood, before you got onto the access road to the point where the trestle is, you told us that was Bayonne, is that correct?

A Yes, sir.

Q And, sir, along what roadway were you operating your vehicle before you made this partial or right turn?

A Kennedy Boulevard.

Is that in Bayonne?

A Yes, sir.

Q Sir, I now show you a picture --

MR. SCHULTZ: Can we have it marked for identification?

xxx (Defendant's Exhibit C marked for identification.)

Q I show you, sir, this picture and I ask you does this show Kennedy Boulevard at the point and does it show the po'nt where you enter the access roadway to the Bayonne Bridge?

A Yes, sir, it does.

Q And, sir, does it show the condition as it existed on June 30, 1972?

A Yes, sir.

Q And, sir, is this before the scene of the occurrence?

A Yes, sir.

Q And were the signs depicted in that picture present at that time?

A Yes, sir.

MR. SCHULTZ: I offer it in evidence.

THE COURT: Show it to Mr. Lassoff.

(Handed to Mr. Las off)

MR. LASSOFF: Objection, your Honor. Kennedy Boulevard has nothing to do with this accident. The questions I asked about were Hudson Boulevard.

MR. SCHULTZ: I will clear that up, if your Honor please, if I may.

THE COURT: Objection sustained to this.

Q Sir, is Hudson Boulevard and Kennedy Boulevard the same?

A Yes, it is, sir. It has been Hudson Boulevard for years.

MR. SCHULTZ: Did I hear you say you sustained this?

THE COURT: The description I have of Kennedy Boulevard going onto the access road is a slight turn to the right. I don't see a slight turn to the right.

gw/lf Girdwood-Redirect 664

Q Does this picture depict the point where you make this slight turn to the right to go onto the bridge?

A Exactly where that bus is, sir, on that picture.

THE COURT: Let me see it.

You mean way up here?

THE WITNESS: Yes, sir.

THE COURT: Objection sustained.

MR. SCHULTZ: If your Honor please, I offered one picture which you said --

THE COURT: Wait a second. You are offering this picture. I have sustained the objection. Let's not argue about the other one.

MR. SCHULTZ: Could we have --

THE COURT: You may.

(At the side bar)

MR. SCHULTZ: If your Honor please, I offered Exhibit B which is the scene where the puddle was and that picture shows the thing to the Bayonne Bridge, the abutment and it also shows the speed limit.

THE COURT: That is what you are really offering it for.

MR. SCHULTZ: If your Honor please, you excluded that on the basis it was beyond the scene of the occurrence.

THE COURT: Right.

MR. SCHULTZ: I now have offered Exhibit C --

THE COURT: The picture taken is too far away from the point of the access road. He says the access is way down here where that bus is. That's the reason I sustain it.

MR. SCHULTZ: If your Honor please --

THE COURT: You have made your point.

MR. SCHULTZ: May I go on the record and finish it, sir?

THE COURT: You have it. It's marked for identification.

MR. SCHULTZ: Okay.

(In open court)

Q Mr. Girdwood, what was the speed limit for traffic in Bayonne as you made this partial right-hand turn on June 30, 1972?

A 25 miles per hour.

Q Now, sir, at the point where this occurrence took place, the actual point of impact, what was to your left?

A One-way road into Bayonne, into the back end of Bayonne.

THE COURT: You mean beyond the abutment, the two or three foot high abutment?

MR. SCHULTZ: Objection, if your Honor please. I

believe he said it was two or three inches. I am not sure.

Q How high is that abutment?

A It starts off at about two inches and then it becomes a wall.

THE COURT: How high is the wall?

THE WITNESS: Four feet.

Q How high is this abutment at the point where the impact took place?

A About four feet.

Q Now, sir, what was to your right?

A Curb.

MR. SCHULTZ: No further questions.

THE COURT: You may step down.

(Witness excused)

THE COURT: We will have a short recess.

(Recess)

(Jury not present)

THE COURT: Yes, Mr. Schultz.

MR. SCHULTZ: That is the defendant's case, your Honor.

THE COURT: Defendant rests?

MR. SCHULTZ: Yes, your Honor.

THE COURT: Is there any rebuttal?

MR. LASSOF: No, your Honor.

THE COURT: Motions.

MR. LASSOFF: Yes, your Honor. At this point the plaintiff moves for a directed verdict on the basis of the defendant bus driver's testimony in which he admitted he was more accurate at the time of his deposition than he was here. In his deposition he testified that he first saw Mr. Chiarello's car start slowing or stopping when it was 50 feet in front of him. He further testified that he could not stop his bus in 50 feet. Therefore, as a matter of law I say that this man was following too closely and violating the Port Authority traffic rules and regulations and the traffic rules and regulations of the State of New Jersey.

THE COURT: Motion is denied. That question of inconsistency is for the jury.

Yes, Mr. Schultz.

MR. SCHULTZ: If your Honor please, I had reserved my right to make a motion at the end of the plaintiff's case.

THE COURT: What you are saying now is directed to the plaintiff's case at the end of the plaintiff's case?

MR. SCHULTZ: Yes, I am, your Honor.

If your Honor please, at this time I respectfully move to dismiss the plaintiff's complaint as against the defendants in the within action, if your Honor please, first on the ground that the plaintiff has failed to show any

actionable negligence on the part of the defendants in this particular case.

The plaintiff at best established the mere happening of an accident.

On that basis, your Honor, I respectfully move to dismiss the plaintiff's complaint as of the end of the plaintiff's case.

THE COURT: Motion denied.

MR. SCHULTZ: I respectfully except, your honor.

THE COURT: Now at the end of the entire case.

MR. SCHULTZ: At the end of the entire case, your Honor, I respectfully move to dismiss the plaintiff's complaint, first, if your Honor please, on the grounds that the plaintiff has failed to show any actionable negligence on the part of the defendants herein.

I also move to dismiss the complaint on the grounds that the plaintiffs, through the testimony of the medical experts that have been called, have failed to establish that the occurrence complained of was the proximate cause of the injuries that they claim that they sustained.

That's it, your Honor.

THE COURT: Denied.

What I suggest, we will let the jury go out to lunch -- how much time do you want for summations?

MR. SCHULTZ: I would like equal time.

THE COURT: Mr. Lassoff.

MR. LASSOFF: No more than an hour. I am not as longwinded as last time.

THE COURT: You told me that last time.

MR. LASSOFF: I was on the head of 45 minutes. I have a doctor from Florida this t'me, who is important.

THE COURT: I will give you 50 minutes.

MR. SCHULTZ: I won't take any longer than that, Judge.

THE COURT: We can get the charge in. My charge is only fifteen minutes. We will have the jury come back at a quarter to two and we will have summations and charge. I will rule on your requests to charge at a quarter to two.

MR. SCHULTZ: I was going to ask you that, Judge. I still have not received from the attorney for the plaintiff his present requests.

THE COURT: All he had was the New Jersey statute. Did you give it to him? I told you when we started the case.

MR. LASSOFF: I offered it to him. As you said, there are three New Jersey statutes and he knows it without my giving it to him.

THE COURT: I asked you to give him the document.

MR. LASSOFF: It was a copy of the same one I had done before. There is nothing new.

THE COURT: You have one here with one request to charge and then you have another one with a request to charge three statutes.

MR. LASSOFF: Both were given to your Honor before the last trial.

THE COURT: I am not worried about your giving it to me. Give it to Mr. Schultz.

MR. LASSOFF: I will give him a copy.

THE COURT: We will adjourn to a quarter to two, at which time we will have summations and charge.

Mr. Clerk, go in and tell the jury that the testimony is completed and they may go to lunch and come back at a quarter to two.

(Luncheon Recess)

AFTERNOON SESSION

:40 p.m.

(In the Robing Room)

THE COURT: I will rule on the requests to charge.

Mr. Lassoff, on the set that has three requests to charge, I will deny them because the law there is not applicable The place where the accident occurred was under the jurisdiction of the Port Authority, and their traffic rules will apply.

Consequently, I will grant the single request to charge submitted separately which refers to the traffic regulations of the Port Authority of New York.

On defendant's requests to charge, request number one is denied except as charged; request number two is denied except as charged; request number three is denied except as charged. I do not charge that it has to be a substantial factor in bringing about the injury.

MR. SCHULTZ: If your Honor please, the cases, as I understand it, vary between the use of substantial factor or proximate cause, which I believe are really interchangeable.

THE COURT: I will give the same charge I gave last time.

MR. SCHULTZ: I don't remember that verbatim.

THE COURT: I will read it to you. To dispute proximate cause not only must the cause actually contribute

to the result but such a cause must not be a remote one. It is a cause which in the natural and continuum sequence, unbroken by any efficient intervening cause helps produce the injury and without which the accident would not have happened.

THE COURT: In other words, sir, you are not going to charge number three?

THE COURT: Not in the form you give it because I won't give the words "substantial factor."

Number four is denied. Number five is denied. Number six is denied except as charged. Number seven is denied.

MR. SCHULTZ: May I respectfully except, your Honor?

THE COURT: Yes.

MR. SCHULTZ: If your Honor please, may I have a few moments? Mr. Lassoff left for lunch and all the exhibits that he had I didn't have them at my disposal to put them together. I will need about five or ten minutes more.

THE COURT: Sure. I will give the same questions to the jury I did on the last trial.

MR. LASSOFF: Your Honor, can I ask you a question?

THE COURT: Yes.

MR. LASSOFF: I see that the weather is worsening.

Are you going to give the case to the jury today?

THE COURT: Absolutely. We can stay here till six o'clock and let them go home. If they can't agree on a verdict by six we will let them go home and come back tomorrow.

MR. SCHULTZ: Your Honor, I teach on Tuesday nights and my class starts at a quarter to six. So if they haven't reached a verdict by 5:30 could we terminate?

THE COURT: Sure.

MR. SCHULTZ: I have to get over to teach the law of contracts.

(Recess)

(In open court - jury present)

THE COURT: You may proceed.

MR. SCHULTZ: If the Court please, ladies and gentlemen, Mr. Lassoff, this is the time that the attorneys are allotted to discuss the evidence with you. Each attorney operates in a different fashion at this stage of the proceeding.

It is my function to go over the testimony with you to assist you in reaching a just and equitable verdict in this case.

If you will review what has happened here in the last few days you will reach the conclusion that there were twelve witnesses who appeared before you to give testimony.

There have been many exhibits placed before you or which are in evidence, at least. The witnesses can be divided up into factual witnesses, if you will, and medical witnesses.

The plaintiff called as medical witnesses Dr. Friedman, Dr. Leone, Dr. L. Jackson Spitz and Dr. Lawrence Kaplan. The defendant called as medical witnesses Dr. Gould and Dr. Baird.

The plaintiff called as factual witnesses Mr. Chiarello, the plaintiff, Mr. Hutchings, the retired Port Authority patrolman, Mr. DeVoy, a bookkeeper or assistant manager at the Universal Maritime Stevedores organization, a Dr. Les Seplaki, who purported to be an economist, and Mrs. Chiarello. As factual witnesses for the defendant the defendant himself appeared, Mr. Henry Girdwood.

I would like to discuss with you at the moment some of the witnesses which I feel did not contribute a great deal or did not contribute much to this case at all.

The first witness in that aspect is Dr. Friedman. Dr. Friedman examined this plaintiff on two occasions, one in May of 1973 and another in January of 1976. Both examinations of the plaintiff were conducted at the request of lawyers who represented the plaintiff. On the first occasion in May of 1973, Dr. Friedman was requested to examine in behalf of a prior lawyer, Mr. Heckerling, and

gw/lf

in January of '76 he was requested to examine in behalf of Mr. Lassoff.

You must, please, if you will, remember that a plaintiff, if he sustains injuries, comes under the care of doctors. Those doctors are treating doctors who maintain and set up a regimen of care. A defendant does not have that opportunity because his doctors do not treat plaintiffs. The best that a defendant can ever do is offer you a doctor who has conducted an examination. That's the best that a defendant can ever do because he never has at his disposal the treating doctors who took care of the plaintiff.

Dr. Friedman, then, was not a treating doctor, he was a doctor who was asked to examine for the purpose of testimony and supplying reports to the plaintiff's attorneys, Mr. Heckerling and Mr. Lassoff.

In essence, he described the injuries as he saw them and he stated that he found the injuries to be of a permanent nature and it is my opinion that you can, if you choose to, recognize that his opinions and his findings must be colored with a view to litigation.

The next witness that I feel contributed very little to this case, however he did supply facts, was a Mr. Joseph DeVoy, the assistant manager of the Universal Stevedores. The gist of his testimony was that Mr. Chiarello's

base pay in 1972 was $15,999 and I think 92 cents. I'm not sure of that, of the pennies, anyway.

He then testified as to what someone else earned in 1975, who he claimed was a man of similar seniority and doing a similar job, and he stated that that man in '75 earned $19,500 and some change. I can't recall.

I submit to you that merely because someone else was earning that base pay does not indicate that Mr. Chiarello would have been earning that base pay or that he would have been there, because you must remember that Mr. Chiarello was an employee of American Stevedores, which was owned by members of his family, they also owned Pittston Stevedores, and the other members of his family stayed with Universal for approximately a year and then were terminated. There is no . cation that Mr. Chiarello would have continued at this particular function, and I believe that that portion of Mr. DeVoy's testimony is speculative. However, it was presented to you and I must comment on it.

Now, the next witness that I feel contributed very little to this case as a factual witness was Mr. or Dr. Seplaki. He stated that he was an economist at Rutgers and that he had been in the academic world for I don't know how many years and that prior to that he had served as a consultant to somebody. He didn't say to whom. And he was

asked to give you various figures as to how much would be necessary to be invested to yield a certain amount of money, $19,500 and we received two or three separate figures from him. He attempted to establish an inflationary trend, projecting it over a period of 20 years, with no basis. When I asked him about the depression, whether or not there was a deflationary period from 1930 to 1937 or '38, he knew that that was a deflationary period and that prices had gone down, and when asked if there was a recession today he admitted that there was. However, the Court indicated that the cost of living had not gone down in spite of the recession.

In essence, though, as I saw Dr. Seplaki's testimony, it was unreliable. He didn't know about the various interest rates for these various treasury notes, he didn't wish to make an admission as to that, and I feel that he offered very little to this case. You can examine that and determine whether or not this man in his computations and what he had to say to you is worthy of any real credibility.

The next witness who may or may not have supplied anything to this case is quite interesting, and that is Mr. Hutchings. What he testified to did not supply anything, in my opinion. However, the manner in which his testimony was elicited indicates and sets forth a pattern for you to

determine, to determine whether or not there has been some architect, someone orchestrating this procedure.

I took the liberty of having Mr. Hutchings' testimony, a portion of it that was given, transcribed. If your recollection is different as to what he said and what was said, then naturally, of course, yours controls because you are the exclusive triers of the facts and the finders of the facts. However, Mr. Hutchings first said that it was raining at the time of his arriving there. Both the plaintiff and the defendant tell you that it was not raining, that it was not raining at the time of the occurrence, and that is one indication as to an error on the part of Mr. Hutchings, however, not great. It's just an error.

The plaintiff had testified that the driver's seat -- that's Mr. Chiarello -- had broken. In order to substantiate that aspect of the case, Mr. Hutchings was asked these questions. As I say, if your memory is different, yours controls.

Question by Mr. Lassoff:

"Q What did you notice with regard to Mr. Chiarello's car?

"A Can I read the damage report here?

"THE COURT: I will let it in.

"A Rear trunk and bumper damages, front seat broken."

At this point I wish to say to you there is a statement that the front seat was broken. It doesn't say which seat was broken. The front seat broken.

"THE COURT: Is this Chiarello's car?

"MR. SCHULTZ: May I respectfully object at this time.

"THE COURT: Overruled.

"A Front seat broken, right front fender damaged, right front headlight broken."

Again from the witness no indication which seat is broken. Front seat broken.

Question by Mr. Lassoff:

"Q When you got to where the cars were, did you notice in what position the right front seat of Mr. Chiarello's car on the driver's side was?

"A It was broken and bent backwards."

I submit to you this is part of some of the orchestrations. Up until that point there was no testimony by this Port Authority retired man as to which seat was broken. Mr. Lassoff says the right front seat on the driver's side, and then he says it was broken and bent.

This is one of the factors to consider, not for

what was said but the manner in which it was elicited and brought out to you.

Mr. Hutchings went on further to tell you that in the rain he walked around and looked at skid marks but they were careful not to ask him how long they were --

MR. LASSOFF: Objection, your Honor. The defendant had an equal opportunity to ask those questions.

THE COURT: Sustained.

MR. SCHULTZ: There was no question as to how long the skid marks were. I submit to you if you have ever been out in the rain you are not going to see skid marks or marks of a car while it's raining or on a wet roadway even if it isn't raining, it's not going to stay there.

In any event, you can consider that with relation to Mr. Hutchings.

So from the standpoint of what he had to say he offered very little, but the pattern of the trial begins to take shape with Mr. Hutchings.

The next group of witnesses are medical witnesses and I would like to take and review with you Dr. L. Jackson Spitz's testimony. First one must recognize that he treated Mr. Chiarello from July 3rd, I think, of '72, until July 30, 1973. During that entire period of time he rendered, as I recall, about every -- it was an average of a month or so,

and then there was a hiatus of several months and then back again, and he gave him physiotherapy treatments. He, himself, never once took an X-ray and he took his man's blood pressure on one occasion. Highly significant of Dr. Spitz is this, that he was a friend or he knew and had treated the plaintiff's father-in-law, Mr. Cardillo.

MR. LASSOFF: There is a difference between being a friend and had treated.

THE COURT: He may comment.

MR. SCHULTZ: Perhaps it would be better to say that he knew the plaintiff's father-in-law and had had a knowledge of him for a period I think he said of five years or six years, or whatever it may be. And when I questioned him about this man's blood pressure, hypertension and cigarette smoking, he would not make a statement as to whether high blood pressure, smoking two packs of cigarettes a day or three packs of cigarettes a day and overweight would have any effect on this man's life expectancy. He wouldn't say that he was obese. However, in January of 1973, he was examined at Richmond Memorial Hospital -- there is a record here -- they brought in a consulting physician to conduct a medical examination of this particular plaintiff. It states as follows:

"36 year old man with a long history of hypertension

"for which he has been treated with various medications. The patient has been obese as long as he can remember and has a prodigious appetite, which he does not make any conscious attempt to curb."

The blood pressure is 145 over 90 and the impression is "marked exogenous obesity, heavy cigarette smoking, three packs a day, hypertension, probably related to overweight."

And further it says here: "Comments. Feel the blood pressure would probably come down toward or to normal without medication if the patient would lose weight. Have emphasized the importance of this to him. Because of his obesity, a strong family history of hypertension and cardiovascular disease and his heavy cigarette smoking, this patient is a good candidate for early difficulties from the standpoint of coronary disease."

Dr. Spitz would not comment with relation to this, and I suggest to you Dr. Spitz was less than candid with this Court and with you. Be that as it may, his testimony was to the effect, as I told you, that he treated him on these various occasions and he stopped seeing him in July of '73, and I think he, from a medical standpoint, added very little except, again, the fact that he would not state to you that overweight, cigarette smoking and high blood pressure would have a tendency to diminish one's life expectancy

Again, it is evidence of a pattern in this particular case, not so much for what he said but the pattern.

The next medical witness that was called by the plaintiff, as I recall, was Dr. Leone. Dr. Leone was a doctor who had originated in Brooklyn and who went to school in Italy, practiced here for a period of four or five years, and then went to Florida, and he assisted at this particular operation. He did not conduct the operation, he was the assistant, and he had the general management of this particular plaintiff for the period of time that he went down there.

Dr. Leone, if you will examine the hospital record, the operative record, states they went originally into the L3-4 interspace, which was not the area where the myelogram indicated that there was a defect. He and the operating surgeon then had some more apparently portable X-rays taken and they went down to the proper site, which was down further.

And he told you that at that point they ascertained that there was adhesions and scarring at the L4 nerve root area. He also told you that there had been a rent in the dural sleeve and that they had removed eight cc.'s of the disc which you have later learned, and admittedly, they can't tell whether it was all of the disc or not. However,

he let one thing fly and he let one thing out that perhaps the plaintiffs would not like to hear. He said the scarring was of long duration. That's what he said.

I questioned him, he having volunteered this, I did not elicit it, he stated it, and I asked him whether or not he could tell us how long scar tissue had been present. What did he say to us? He told you that in his opinion it came from this occurrence that took place on June 30, 1972.

It still did not overcome his original statement that it was of long duration. Having said it, I am sure he would like to retract it, but he said it. And he stated that in his opinion this gentleman was totally disabled and that his condition was permanent and that there could be no further help for this patient and that all operative procedures had been undertaken and, in essence, I believe that's what his contribution was to this case.

The plaintiffs then produced Dr. Kaplan. And you will recall, I did not require that Dr. Kaplan state his qualifications. I stated to the Court that I would concede his qualifications and that he was highly qualified. There is no question about that.

What did Dr. Kaplan add to this case? And incidentally Dr. Kaplan had testified previously. That was elicited. Dr.

Friedman had testified previously. That was elicited. Dr. Spitz had testified previously. And Dr. Kaplan, when asked to describe and go through his findings -- and incidentally, Dr. Kaplan told you that he was a neurologist and a psychiatrist. He told you that there was some discrepancy with the knee jerks and the ankle jerks, the knee jerks on the right were diminished but yet on the right ankle they were high. He also stated to you that the alleged or claimed weakness in the foot, the right foot, did not follow the anatomical distribution of the nerves and that when he suggested movement with his hand and helped that this movement of the foot became better.

He also stated that in his opinion the pain that this gentleman was experiencing came and was present today from scarring. He said the last myelogram taken in July of '75 indicated that there may be scarring in the L4-L5 interspace or a protrusion. And if you will recall, and I did it because I was hoping that you would remember it, I asked him, "Doesn't that myelogram show stringing, Doctor?"

He said, "Yes, we hadn't used stringing before, but that's what it is, it's stringing."

I said, "Doctor, doesn't stringing indicate to you scarring?"

And he said, "Yes."

Then I asked him a very key question and he admitted that he had testified prior to that the same way, that you cannot tell how long scarring was present, you cannot tell how long that scarring was there. He said you cannot tell and he couldn't tell.

He also told us that these complaints of lack of sensation that the plaintiff made did not follow the distribution of the nerves. He also told you that in his opinion this gentleman could walk without a cane. He also told you that he could find no organic neurological involvement in this man's sacral nerves which controlled the sex act. He said there was no organic reason for this. He attributed it to a psychogenic overlay, in other words, a state of mind.

I asked him, however, "Doctor, could lifting objects over a period of ten or eleven years cause back injury of weights from one pound to a hundred pounds?"

Learned counsel suggested that I shouldn't be talking about the lifting of weights for exercise, and I changed the question to make it sure that it was in the course of his employment. And Dr. Kaplan said, "Yes, this type of activity could cause back injuries."

Mrs. Chiarello was a factual witness, and I would like just briefly to discuss what she said. She told you

of her relationship with her husband, that the husband had taken the children out to do ball games and so forth and so on and that there had been some change in their marital relationship.

I would like now, however, to talk to you about Dr. Gould and Dr. Baird. Please bear in mind that the defendants cannot do more than what we did -- obtain the services of a doctor to examine him.

Dr. Gould is a diplomate in the field of neurology. He graduated in 1924, I believe, he said, I am not sure, from Yale and today he is 74 years of age and he has been in this business or this profession for 50 years, held imminent positions in various hospitals, and I don't think that anyone would expect that a man of his years and of his standing would come in here at this stage of his life and perjure himself and tell you an untruth.

I asked him if he had ever testified on any matter that I had been concerned with, and I thought he had and he told me he hadn't and he said that I had sent him -- had asked him to examine a patient but that never came about. I asked Dr. Gould to tell you what he had done and observed about this gentleman when he examined him. And what did he say to you? And before we go into that try to remember, if you will, that when these lack of sensation tests are conducted

it's done with a pin prick and the patient must tell you whether he feels it or he does not feel it. They don't stab him hard enough to make him jump. It's pricking. And the patient must inform.

What did he say to you, in essence? He told you that the man had had an injury to his back. There is no question that this man had an injury to his back. Where it came from is questionable, in my opinion. He had an operative procedure in which a portion, a good portion, of the disc was removed and they attempted to free up a nerve root which came out of L4 and L5, which had had scarring and adhesions.

Dr. Gould told you that he conducted various tests. And what did he say? He said that the complaints of lack of sensation around the right flank and the hip did not coincide with the distribution of the nerves that would be affected by this L4 problem. And I think he told you about the electric light circuit, if the fuse goes out in one place that you know should cover the bedroom and something else goes out, you know something's wrong, and that's what he tried to get across to you was these claims of lack of sensation here had nothing to do with this L4 nerve.

He also told you that this man complained of a lack of sensation on the top of his hand but yet he could

feel everything on the bottom, and he said this man claimed he had a weakness in his right hand and yet is walking around supporting 260 pounds with this cane. If his grip was weak he said he would collapse.

I don't think that Dr. Gould is going to make these statements to you, first of all, if they are not true; secondly, they are sound. You can evaluate it. And he said that this man was capable of doing some work. Dr. Gould further was questioned about bleeding, hemorrhaging and scarring, and he told you that not all bleeding causes scarring. He told you not all hemorrhaging causes scarring. And he said to you, I think one of his closing statements was that he hasn't done any operating in about 45 years. There's a reason for that, and Dr. Baird told you what the reason was. Dr. Baird told you --

MR. LASSOFF: Objection, your Honor.

THE COURT: Sustained. The reason for Dr. Gould operating would have to come from his mouth, not Dr. Baird's. Continue your summation.

MR. SCHULTZ: Thank you very much.

Dr. Baird examined in behalf of the defendants and he told you what he found. He told you he found no lack of size, in other words, no atrophy in the thighs, in the calves, he found no loss of function in the hand. He told you that

this man in his opinion had a ten percent loss of body disability, in other words, general overall disability. I think he said ten percent. He said this man was capable of working at non-lifting, sedentary jobs, and he told you that orthopedic surgeons were more familiar with nerve root damage than were neurologists because the neurologists don't operate but that the orthopedic surgeons do the operating and they're in there. And he told you that he, in his opinion, could not state when scarring originates, no one can tell you, he said, when scarring originates, what brings the scarring about, and in his opinion this man's pain was caused by scarring. I believe he was asked as to whether or not lifting and moving railroad car doors are capable of causing back injury and he said yes, and he stated to you that the normal procedure as an orthopedic surgeon if the man has a weakened right leg, that the cane should be carried in the left hand to support, and, as I indicated to you, I believe that he stated that this man could walk without a cane and, in fact, did.

He also said that there was no neurological involvement that he was able to ascertain. And he was questioned on cross examination as to the myelograms and the X-rays, and his testimony was only yesterday, I am sure I need not recount it. In the normal X-rays he stated he found no changes,

he found very minimal narrowing of the disc space and he freely admitted to you in normal X-rays you cannot see herniated discs. No question about it. He told you that in the myelogram that he saw there appeared to be scarring, small narrowing and stringing, I believe.

Now, that basically is the medical aspect of the evidence that I think was before you. The two factual witnesses are Mr. Chiarello himself and Mr. Girdwood, the defendant in this case. Both are agreed the accident happened on June 30, 1972; both are agreed that at the time it was not raining, that it had rained before; both agreed that at the point of the impact there was a slight upgrade.

MR. LASSOFF: Objection, your Honor.

MR. SCHULTZ: Both agreed --

MR. LASSOFF: Withdraw it.

MR. SCHULTZ: Both agreed that prior to coming to the scene of this occurrence one went down a grade, that there was a level spot underneath the trestle and then there was an area where you went up an upgrade. I believe that's not in dispute.

What is in dispute, first of all, is the speed limit. On a prior occasion of testimony I asked Mr. Chiarello:

"Did you ever testify as to the speed before?"

And he said, "No."

On this occasion he testified that the speed limit was 20 miles per hour. It should be fairly obvious to you and admittedly he had gone over the transcript with his lawyer of prior testimonies, admittedly he had spoken with his lawyers and they knew that Mr. Girdwood had testified that he was operating his vehicle at 25 miles per hour.

Mr. Girdwood said to you that the speed limit at Bayonne was 25 miles per hour and he drives it every day. But that's an added thing that came between the two testimonies of Mr. Chiarello and today or this present time because they added the 20 miles.

Another thing that was added, Mr. Chiarello stated that at the present time at this trial here that after the accident he was shaken, dizzy and scared. However, on a prior occasion he testified as follows, and I asked him about it:

"Didn't you testify in this fashion?

"Q Following the accident what happened?

"A I sat there. I sat there for quite awhile, what seemed like quite awhile, anyway, and the bus driver came over to the car and asked me if I was all right. I told him I was shaken. He came over and asked me if I was all right. I told him, I says, 'I'm shaken but I think so.'"

"So he said, 'Are you sure?'

"And I said, 'Yes.'"

In January of 1976 there was no mention of speed limit, there was no mention of dizziness, being scared. In fact, in January of 1976 he testified that he had said that he was all right and that was that except that he said he was shaken.

Added ingredients come into this case with the passage of time. Ask yourself, who is the architect that adds these ingredients?

Let us examine Mr. Chiarello's testimony a little further, if you will. He states that he brought his vehicle to a stop behind another car and that it had been raining with a thunderstorm, there was a light puddle ahead but he states categorically that at this dip in the roadway underneath the trestle there was no standing water, none at all. The lowest spot in the roadway, no water, none at all.

What did Mr. Girdwood tell you? He told you he proceeded at a downgrade of I think 25 degrees, that under this trestle was a roadway of 100 feet and there was a collection of eight, nine or ten inches deep for a distance of about 25 or 30 feet, I can't recall exactly, and that it was in the right-hand lane. He told you that he goes there twice a day, that every time it rains it fills up. Which is

BEST COPY AVAILABLE

more logical, what Mr. Girdwood tells you about the collection of water or that which Mr. Chiarello tells you?

Mr. Girdwood also told you that there was always a collection of mud, something from the park, and I think he referred to it as garbage. I think that's what he said. And that made it slick.

As to the happening of the accident, you saw Mr. Girdwood there. He is not an intellectual genius. He is a bus driver and a truck driver and he was asked as to feet per second, howmany feet did you have to do this and how many feet can you stop, how many fractions of a second does it take you to take your foot off the gas pedal and onto the brake. Those of you who drive, you know what the answers are. Use your common sense and experience. What did he tell you he did, though? He went through this puddle of water. These vehicles ahead came to a stop. He said to you they were about 75 feet ahead of him. He may have made other statements, I don't recall, as to distance. It's obvious he was confused fencing with a skilled lawyer. He puts his foot on the brake, his car slides, he couldn't go to the left initially to avoid the water because there was a car on his left. The car went to the left to avoid the water because he couldn't, there was a car there. When he got up to where the scene of the occurrence was, there is a wall or

abutment on his left and the curb on the right. He couldn't go anywhere. He puts his foot on the brake and the bus slides with this collection of water --

MR. LASSOFF: Objection, your Honor. There is no testimony of any collection of water at this point.

THE COURT: He is giving his version of the facts.

MR. SCHULTZ: Finished?

MR. LASSOFF: Yes.

MR. SCHULTZ: He had gone through this collection of water and he applied his brakes and his car, as he said, slides, slid, went against the right-hand curb and he said at the moment of impact he was going seven to eight miles per hour, that the bus had slowed down. There was an attempt to show that in this braking distance the bus didn't slow down and he still was going 20 miles per hour when he hit him. You can use your own judgment whether a vehicle with brakes on slows down or not. You don't have to be an engineer to figure that. He also told us about Mr. Chiarello getting out of his car, leaning into the car to get the keys, bending down to open the trunk and walking back and he saw no visible signs of injury. I submit to you that if a man sustains the injuries which brought about the injuries that you see here he wouldn't be doing that right after the accident. No way, no way would that happen.

I want you to go back and think some more about Mr. Chiarello's testimony.

He played football as a tackle. He weighed then, he told us, 235 pounds. Admittedly he absorbed blows about his neck, head and back. I asked him and he said yes. I asked him about his prior testimony and he said he had done that. He denied, however, that he had sustained any injuries. He admitted receiving blows but no injuries.

I asked him about his work: do you lift objects? Yes, I do, for a period of ten or eleven years.

This man has been working on the waterfront lifting objects weighing from one to a hundred pounds, working at sliding railroad car doors. I ask you --

THE COURT: You asked for 50 minutes. You have already gone 55.

MR. SCHULTZ: I am sorry. I will try to finish up. I am sorry about that, sir.

I submit to you that the proof as to the injuries that this man says he sustained is as equal as to whether or not it happened from something prior. The burden of proof is on the plaintiff to establish and prove this. I submit to you they have not done so.

With relation to the liability in this case, ask yourself what could Mr. Girdwood have done in a situation

such as this. The test is what does a reasonably prudent man do under the circumstances. He is following traffic. He told you he is following the flow of traffic. He goes through a puddle of water and cars 75 feet in front of him come to a stop. He applies his brakes. He can't go left, he can't go right, and the bus slides. Could he anticipate that they were going to stop 75 feet in front of him? Does he know that they are going to do this? What else could he have done other than that which he did? I say to you that Mr. Girdwood acted as a reasonably prudent man would do under the circumstances. He was not guilty of any negligence. Unfortunately an accident occurred through no fault of his, and I say to you that the plaintiffs have not made out a case of negligence against Mr. Girdwood. I ask you to consider this. I know it's difficult. I know that you are being asked to say to a man who has sustained an injury, "You cannot recover because this man Girdwood did not do anything wrong, he was not guilty of negligence."

But you people I believe took an oath that you would try this case solely and wholly on the evidence without regard to sympathy, bias or prejudice. You are here to do justice. I believe that you will do justice. I think it's better to light one candle for justice than to walk around in the darkness of injustice, and if you do that I think you

will have to find for the defendants because, ask yourself, what did Mr. Girdwood do wrong under the circumstances then and there prevailing. What would you -- I can't say that -- what would you expect him to do? I ask you to consider it.

I thank you for your attention, I thank you for your courtesy. Take the case, please, do justice. Thank you.

MR. LASSOFF: Your Honor, could we have a short recess. I think Mr. Schultz has messed up my exhibits and I have to get them in order again.

THE COURT: Do it now.

MR. LASSOFF: You have been here for six days, ladies and gentlemen, and you have heard all the testimony in the case. I guess you are asking what the trial is about. Well, the trial is always a search for the truth. It's also a search for justice. But you have been asked to sit here because you are seven people, ultimately to be six, with common sense, with diverse life experiences, with judgment and experience, and you are going to decide the truth of this matter because that's basically what we are here about.

The accident happened on June 30, 1972, on an access road to the Bayonne Bridge. There is no conflict in testimony that at the point where the accident occurred the roadway was one lane. There is no conflict in testimony that at the time of the accident it was not raining. In fact,

I think Mr. Girdwood testified that it stopped raining some fifteen minutes to a half hour before. My client said about five minutes before. There is no conflict as to where the accident took place. The pictures have been marked at the same place by everybody. So what is the conflict about?

We are asked to believe, one, for some reason that has nothing to do with this case, that there was a pool of water under a trestle. Now, you note that Mr. Girdwood admitted that his brakes had nothing to do with this accident, but at one time it might have. So there was a pool of water 25 to 30 feet long by eight, nine, ten inches deep that his car traversed, in one part of his testimony, at 20 miles per hour and in another at 25 miles per hour. He also said that prior to reaching this pool he was going between 25 and 30 miles per hour. And I asked him --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. LASSOFF: I asked him, "Do you mean to tell us that you went through a pool of water eight to nine to ten inches deep, 25 to 30 feet long, at a speed of 30 miles per hour -- 20 miles an hour -- 20 in one place and 25 -- while up ahead these cars came to a stop for a pool of water two or three inches deep by ten to fifteen feet long, is that

what you mean to say?"

He said, "Yes, but they were smaller. They could go around the sides of the road."

Do you remember he told you this road is canted or pitched so that the water flows to the sides of the road? That's where the deepest water would be. Does that make sense to you, that they went around and he couldn't because he was too big because they went around to the deepest portion of the water?

Think of the logic of this whole statement. We do know that all of these cars stopped for a minor pool of water to go through slowly, yet Mr. Girdwood told you that he drove his bus at a speed of 20 to 25 miles per hour through this I should say deep pool of water. I don't know why you would do that.

Now, if you recollect, Mr. Girdwood on direct testimony tried to tell you that when he saw my client's brake lights go on my client was 75 feet in front of him. He had previously testified at a deposition, an examination before trial, in April of 1974, that when the brake lights went on my client was 50 feet in front of him. He had also previously testified that when he entered the dip my client's car was 75 feet in front of him but when he saw the brake lights come on he was 50 feet in front of him. What does that

mean? That means that his car could not have been going at the same speed the cars in front of him were going because it had gained one-third of the distance, which means that --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. LASSOFF: Which means that it had to be traveling at least a third again as fast as the cars in front of him because the distance had narrowed within a hundred feet from 75 to 50 feet from Mr. Girdwood's own testimony. And he further told you that his memory in '74 was better than today and more likely to be accurate.

Why the change from 50 to 75 feet? It's very simple. Mr. Girdwood told you that on a dry road he could not stop that bus going at 20 miles per hour in less than 60 feet and that on a wet road it would take him 70 feet. I disagree with both figures. I think it would take longer in each case, but from his own testimony if he were 50 feet behind my client's car there was no way he could possibly have avoided the happening of this accident because he could not stop his bus under any circumstances, wet or dry, in less than 60 feet. So he changed it to 75 feet.

That didn't make any difference, really, because those of you who are drivers know when you see brake lights go on it does take you some point in time for your brain,

your eyes, to register a message to your foot to take your foot off the gas and put it on the brake, and if that point in time is only one quarter of a second going at 20 miles per hour, that car would have covered seven and a half feet, half a second fifteen feet, and this is at 20 miles per hour. He had also previously testified in '74 he was going 25, which would take more distance. So that if we believe his testimony to the utmost, even at 75 feet he could not have avoided hitting Mr. Chiarello's car.

What else is significant? We have one car, the third car in front of Mr. Girdwood's bus, which is proceeding slowly through this puddle in the roadway. We have car number one in the photos where we have marked car number one, a man who has been identified as Mr. Larsen, stopped, stopped for seconds, not a second, seconds. I asked, "Is it two, three five?"

He said, "I couldn't tell you."

I said, "Is it at least two?"

He said, "Yes."

We have Mr. Chiarello stopped ten feet behind Mr. Larsen's car, stopped for seconds. We have this bus coming along and smack into Mr. Chiarello's car even though it had been fully stopped for seconds. And it is interesting to note that in the deposition when he was asked, "How fast

"were you going, at what speed were you going at the point where the impact occurred?" he said, "My wheels were locked at 20 miles per hour."

Not seven or eight miles per hour, 20 miles per hour.

What does that mean? It means that the way my client told you this accident happened is much more likely to be so than Mr. Girdwood. You remember he said that when he took his foot off the brake, when he saw the car in front of him slowing, he could see back down to the point where the bus was just entering this dip, and at that point the bus was 175 feet behind him. When he came to a full stop the bus was in the dip and at that point was 135 feet behind him. He says that bus came roaring out of the dip. He looked to see if there was anywhere to go. There was no where to go. And that bus kept coming hard. And what does that mean? It means that that bus had much more distance than he is telling you about, and with even all of that distance that bus was going so hard and so fast it could not avoid the accident.

Now, you heard this driver, Mr. Girdwood, admit to you his brakes were all right, that the reason he skidded was the roadway was wet. He knew the roadway was wet. He knew, according to him, there is always garbage and stuff on

that roadway. Knowing all this, he proceeded at a speed of 25 to 30 miles per hour. In some places he said 20. My client says that from his experience there is a sign in the area before you get in this access road that says 20 miles per hour. This is before you get to the trestle.

Mr. Girdwood says 25. Nonetheless, he admits going 25 to 30, more than the speed limit right there, on a day where the road he says is flooded, where he says there is debris and mud and garbage and slippery substances on the road. Is this the way you would operate your car, beyond the maximum --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. LASSOFF: Beyond the maximum speed limit at a point where you know the roads are wet and hazardous? I say that this accident happened only for one reason, the carelessness and negligence of Mr. Girdwood and the Domenico Bus Company.

The car in front of Mr. Chiarello slowed down and stopped. Mr. Chiarello slowed down and stopped. The bus did not slow down and stop. It continued and struck Mr. Chiarello and drove him into the car in front. The vehicles behind the bus didn't strike the bus. The only person who did not avoid this accident was this bus driver,

and you must remember at the time of the accident he was already a half hour late on his run, already a half hour late. Ask yourself if that's not the reason he was proceeding at that speed. I don't want to belabor the point of liability. I didn't see any issue of liability in this case in the f'rst place. It's unrealistic to state that a professional driver, a man who handles people's lives, he is driving people in this bus, should not know that under the circumstances he was facing that he was operating this vehicle at an excessive speed and following too closely and know that he could not have avoided this accident. By his own admission, if what he said originally was true, 50 feet, he told you he couldn't stop the bus in 50 feet. No way he could have avoided this accident. That's what we call following too closely. I say to you following too closely is carelessness, it's negligence and that's what makes the bus company and Mr. Girdwood liable.

Now, of course, there are two defendants here. There is Domenico Bus Company and its driver. His Honor will tell you the law that applies to both.

I want to talk to you about the injuries. I don't see any issue of liability. I have to talk to you about it because you will hear pleas from Mr. Schultz about not avoiding this accident. Obviously anybody could

have avoided this accident if they drove their vehicle at a proper rate of speed under the circumstances and kept their eye on the road.

We will go back to the scene of the accident. My client testified to you that at the time of the accident this bus struck his car with sufficient force to hurl him backwards against his seat and for the seat to break and collapse and he and the seat to go down flat and that when he was driven into the car in front, that tossed him up into the air again.

The police officer was brought here for one reason and one reason only. He was an impartial witness. He came to the scene of the accident and he made a report in writing. In that report --

MR. SCHULTZ: Objection, your Honor.

THE COURT: Sustained.

MR. LASSOFF: As he testified to you, he saw with his own eyes that the driver's seat of this car was broken. He saw it. And we are told that there is an architect behind this, that some Machiavelli at the site of the accident was able to control this police officer on June 30, 1972, to state that that front seat of the car was broken. It's pretty good. Especially in view of the fact that my client, being the honest man that he is, told the bus driver,

"I think I'm all right. I'm shaken. I think I'm all right"; that he told the police, "I don't think I'm hurt. I don't want a hospital."

Wouldn't it be interesting that a man who refuses medical aid at the time is concocting a story with a police officer? That is what we are being accused of.

Mr. Chiarello told you that his doctor was away and that on Monday he went to see a Dr. Spitz who found him suffering with his acute tortocollis, which is a sprain of the neck, and a low back derangement, that he came under the care of Dr. Urs, a neurologist, that Dr. Urs sent him to the Richmond Memorial Hospital and to the Staten Island Hospital in Staten Island, where he received physiotherapy, that he was sent to a Dr. Leventhal and a Dr. Frank and Dr. Moreno, and that he returned to Dr. Spitz, who treated him until he left for Florida, that in January or December of 1972, January of '73, he was supposed to be admitted by Dr. Leventhal to the hospital in Staten Island, I think St. Vincents, for a myelogram but there was a flu epidemic, so he called a cousin of his in Richmond, Virginia, a gynecologist, who had him come down and see a Dr. Rennie, a neurologist, a neurosurgeon, where a myelogram was taken which revealed that he had sustained a herniated disc and he had nerve root irritation in the cervical spine. The disc, of course, is in the

back.

You were also told that an electromyelogram had been taken of Mr. Chiarello in Staten Island which revealed abnormality in nerve patterns in the neck, in C5, 6 and 7, and you were told that Mr. Chiarello was scared to death of the surgery that had been recommended. Well, I would be, too. I think you would, too. He went to see a Dr. Lanier --

MR. SCHULTZ: If your Honor please, I will respectfully object --

THE COURT: Overruled.

MR. SCHULTZ: -- placing the jury --

THE COURT: Overruled.

MR. LASSOFF: He went to see Dr. Friedman. You have seen Dr. Friedman. You heard him testify. You got your impressions of Dr. Friedman. He had notes, X-ray -- well, for a doctor, six or seven pages long. He looked at the myelogram, read the myelogram, and he said, "Yes, this man has a herniated disc, he needs surgery but he is afraid of the surgery."

As you heard Mr. Chiarello say, he was advised by a doctor that a warmer climate would help, and he moved to Florida, sold his house in Staten Island and purchased a house in Florida and that after the house had been built he was advised medically to have a swimming pool built and he did

so and that he had a pool in his house in Staten Island as well.

He came under the care of a Dr. Samuel Leone, a man he had never seen before, and Dr. Leone examined him and had with him at the time the reports of two orthopedic surgeons, as you heard, Dr. Lanier and Dr. Friedman. Dr. Leone sent him to Dr. Gervin, a neurosurgeon, and they ascertained that the only help my client had was surgery. And they finally convinced him that he had to undergo this operation, which he did in December of 1973.

They went in there and they opened up his spine and they excised the disc and when they excised that disc they found marked adherent scarring and fraying of a nerve root.

Now, you saw Mr. Schultz try to establish through his Dr. Baird that they first went in at L3-L4, and the attempt was going to be made to show you that the scarring, the bleeding, came from the operation at L3-L4, because they stopped, took new X-rays and proceeded to L4-L5; but Dr. Baird himself admitted that scarring cannot occur until at least six weeks after the bleeding. So we eliminated that.

Dr. Baird was supposed to try to show that an aging process in my 35 year old client, arthritis, could have caused this, when his own X-rays taken two years after

the accident of the neck and back revealed my client doesn't have a trace of arthritis.

They go in there and they find the scar tissue and they attempt to remove as much of it as possible. As you heard, admittedly in doing that they did create a small tear in the dural sleeve which required one suture to sew up and which everyone admits has nothing to do with anything. But it's there.

And they told you that right at the point of the operation they knew that this operation would not have a good result because of the presence of the scar tissue inside Mr. Chiarello's spinal canal. And Mr. Chiarello -- and the hospital records will show this -- had pain in the hospital, was discharged from the hospital with severe pain in the back and right leg, in a walker -- not in a walker. In a wheelchair -- and continued to have pain and complaints and was given finally, some two or three months after this operation, something called a transcutaneous nerve stimulator which sends a different signal from the spine to the brain and from the brain to the spine, an irritation which sort of kills the pain impulses that he is getting. He tried it and it worked for awhile and then it stopped working and was also burning his back. And you heard Mr. Schultz ask Dr. Kaplan and Dr. Leone both, "You have never

"heard of burns from the use of this, have you?"

Both of them said, "Yes, I have."

He said, "You have never heard of a third degree burn?"

Both of them said, "No, sir."

He said, "Dr. Kaplan, you haven't heard of a second degree burn?"

Dr. Kaplan said, "I am not sure, but I have seen first degree burns."

The transcutaneous stimulator doesn't work. What do they do next? They do a procedure called a facet rhizotomy. As you were told, that is a destruction of nerve roots in an attempt to alleviate the man's pain.

Immediately following the destruction, the man is pain free with an ache in his back. Two days later the pain is back and he is discharged and the hospital record for that hospital is in evidence. It is Plaintiff's Exhibit 6, I believe -- yes -- and the discharge diagnosis was: "Intractable back and leg pain."

And you heard the description of the word "intractable." "Intractable" means it cannot be reached by medical knowledge as it now stands.

My client keeps complaining about pain. So they go in again. They do another myelogram. And all of you know

a myelogram is not a procedure that one undertakes lightly. And you had a description of the myelogram. It shows the presence of either scar tissue or a new protrusion at the same disc which is related to the other, or both, and yet Dr. Kaplan tells you and Dr. Gervin -- we are not going to go into all of Dr. Gervin's findings because they are in the hospital record. If you want to read them, you can -- that a further operation would not be productive because the further operation itself would produce new scar tissue and that they, Kaplan, Friedman, Leone, Gervin, Baird, Gould, all of them agree that further surgery would not help my client and that he has to live with what he has.

And what does he have? What was the description of pain that Dr. Kaplan gave you? I asked him, "Could you tell us about the kind of pain that this nerve root irritation, that this scarring on the nerve root in the spinal canal produces?"

He said, "Sometimes it's a dull aching pain; sometimes it's a shooting, stabbing pain; sometimes it's a burning pain."

I said, "Doctor, could you go further? Could you tell us in comparison to other pains what kind of pain is this?"

He said, "This is the worst form of pain the body

"can produce except for a precardial attack," and as you heard from Dr. Gould, that was a massive coronary.

Dr. Gould added one thing, a virus of the face that is more painful. Dr. Gould said that is the only other thing. This is something that my client has lived with and will have to live with for the rest of his life: the worst pain the body can produce. Think of the pain that you have experienced in your life. Think of the pain that you get merely from a nerve in a tooth --

MR. SCHULTZ: Objection, if your Honor please.

THE COURT: Overruled.

MR. LASSOFF: Think of the pain that you get when you close a door on your foot. This is not that kind of pain. This is the worst pain the body can produce except for a massive coronary.

Obviously we are here for a reason. I can't fix Mr. Chiarello up and neither can you. What he has he has and he has to live with it. We are here for money. That is all you can do for him, that is all I can do for him. What money are we talking about? Well, so far in evidence the medical expenses to date from the doctors and hospitals that were produced here add up to the sum of $9,734.73, being $2500 to Dr. Gervin for the operation on the spine, between five and eight hundred dollars for the rhizotomy. I took

$650 as a median figure. $200 for the myelogram. $2000 to Dr. Leone for his work as a treating doctor and his participation in the operation. $507.90, which is the hospital bill of the Richmond Memorial Hospital. $197.78 which is the bill for the rhizotomy. $175.29 which is the bill for the additional myelogram at the hospital, the hospital charges for the myelogram. $3081.26 which is the hospital bill of the Golden Isles Hospital, the hospital at which the herniated disc was removed. $62.50 to St. Vincent's Hospital. That was their bill for physiotherapy, the contractions that they gave to Mr. Chiarello. And $350 to Dr. Spitz.

That's close to $10,000.

My client put into evidence W-2 forms and testified to the year 1971, I believe. I believe the W-2 forms showed that in 1972, the year of the accident, he earned $16,000, and that is the year where he was paid the second half of the year by his employer even though he didn't work a day but his job was terminated for him at that time. That's a full year without overtime, $16,000.

I introduced evidence to show you that a man with the same seniority, doing the same job, making the same pay at the time, who continued to work for that company, two years later was making $19,500 a year as base pay without overtime. So that within two years after this man's pay

stopped the annual pay had gone up $3500 base pay.

Mr. Chiarello has not received any money, any salary, from his employer from January 1, 1973, until now. That is two years -- three years, excuse me, three years and two and a fraction months. For '73 and '74, since we don't have those figures with raises, if you take the sum of $16,000 for each of those years you arrive at $32,000. In '75 we know that the pay had gone up to $19,500 a year, so that's $51,500 and we are assuming that the pay is the same now. In the two months and a fraction that have gone by, $3500 I think is fair. His past loss of earnings, his loss of earnings until today, are $55,000. That's just out-of-pocket money. That's money that's gone, it's past, done with, and it's not the important part of this case.

You have heard in this court a man has a working life expectancy of age 65, which Mr. Chiarello, being 39 years of age today, would have 26 years of working expectancy. The simple arithmetic of $19,500 a year times 26 years comes out to $507,000 loss of earnings without a discount rate and without inflation.

I brought in an economist to tell you what inflation was and what the rate has been in the past. The economist told you that in 1975 the inflation rate was approximately twelve and a half percent and in 1974 almost

fourteen percent, and this was in a depression. That was the inflation rate in a depression.

He says, as an economist, economists now predict that over the next 26 years the annual rate of inflation will be slowed, and he didn't give you a ridiculous figure. He said it will probably be six percent a year. Now, those of you who have gone to the supermarkets to shop, who have gone to the shoe stores to buy shoes, who watch the price of a loaf of bread change week from week, know that this is a conservative figure.

MR. SCHULTZ: Objection, your Honor.

THE COURT: Overruled.

MR. LASSOFF: That in saying six percent he is being conservative, he is not going overboard. And if we add that inflation rate of six percent a year for the next 26 years to Mr. Chiarello's loss of earnings, it comes out to $900,000.

Of course, the defendant is entitled to the benefit of the plaintiffs getting the money now, which is the discount rate we are talking about. Money you have in your pocket can make money, and so he said, "If you apply the same discount rate as the inflation rate," and I am not asking you to apply a five percent rate or a five and a half percent rate, take six percent as the discount rate, I think it's fair --

my client is not an economist, not a dabbler in the stock market -- six percent is a fair rate to get on his money. If you take that off you come to a figure of $615,000 loss of earnings, counting both inflation and discount for present value of money received.

MR. SCHULTZ: I respectfully except, if your Honor please.

THE COURT: Overruled.

MR. LASSOFF: You heard something --

THE COURT: Stop interrupting the summation. I suggest you hold them until the end of the summation. You are interrupting the summation. I prevented Mr. Lassoff from doing it, I am asking you not to do it.

Go ahead.

MR. LASSOFF: You heard some questions about how much money would you have to put in the bank at seven and a half percent interest to get your $19,500 a year. I tell you that that's meaningless. That assumes that whatever you give him is going to go into the bank, that everything he gets is his, that the value of $19,500 today is the same as five years from today, which we know is not so. Within two years of this accident, we know that the pay scale had gone up $3500. Within two years. And that certainly is another evidence of inflation, another evidence. Because

employers do not give out money out of the kindness and generosity of their hearts. They give it out, one, because they have to and, two, it's because it's necessary, because the cost of living has gone up. And they do have conscience and they do know that. So that in those two years the pay scale went up $3500 a year. Those raises were almost 20 percent in two years.

All right. Now, you have heard $615,000 as being his losses, and that's nothing. That's not what we are here about. I told you that I was going to ask you for an enormous amount of money and I knew full well that I was, because the $10,000 in medical expenses, the $55,000 present loss of earnings, the $615,000 discounted and inflated loss of earnings, that's not what we are here about. We are here about pain and suffering and permanency of injury. My client has had to live for the past three and a half, three and three-quarter years with pain that is the next worst kind of pain that the human body can produce. What is that worth? It has destroyed his relationship with his wife, it has destroyed his relationship with his children, it has made him lose his identity as a man. He is impotent, and I don't know if it's for organic or psychogenic causes. He told you what it was. He told you quite frankly he wants to and he can attempt it but when he does the pain

BEST COPY AVAILABLE

becomes so great he can't complete it. Does that sound illogical to you, knowing what is wrong with his back? I ask you for the three and a half years that have gone by to award my client $250,000 for each of those years. Mr. Chiarello is going to have that pain for the rest of his life. You heard Dr. Kaplan say, and he told you what can be done, he said, "We can do one other procedure but Mr. Chiarello is too young for the procedure."

What was that procedure? A cordotomy, severing the spinal cord so that there is no sensation from below the chest and no temperature. That's what my client can look forward to for peace, a severed spinal cord, and then it won't hurt him, because he won't have any sensation. That's the best he can look to.

They have told you that Percodan is a narcotic and that Dr. Kaplan doesn't like it. You have been told that only narcotics now can alleviate the pain to any degree.

Well, we have had complaints that my client likes to eat and he likes to smoke. He might enjoy sex occasionally if he still could have it. They don't want him to eat, they don't want him to smoke, they don't want him to tell you about the pain he has. He has a right to tell you these things.

You heard some stuff about hypertension which

admittedly all of the records say is due to overweight. There is no disease. The doctors specifically state -- once again, their reports are in evidence -- that he eats too much.

Okay. Other people eat too much. It's a known fact that his family -- and you heard Mr. Schultz read to you with a long history of hypertension his father is alive at 68 and his mother is alive at 66. A long history of hypertension for them, too, and heart trouble.

His Honor will charge you, I believe, that Mr. Chiarello, being a man of the age of 37, has an average life expectancy now of another 32.7 years. I am not telling you he is going to live 32.7 years. He might live 50 years or he might live five years, but the average person, male, being 39 years old does have that life expectancy. I want you to believe and know that he is not going and is not capable of being made free from pain short of a cordotomy, short of becoming a vegetable. That's all that can be done for him.

I ask you not to award him the amounts that you awarded -- that I asked you to award for the last three and a half years because, to tell you the truth, the pain is not going to be the same. It's there and it's the same but you don't feel it the same way. You give up and you don't experience

as much. You don't feel as much and the pain is not as bad. It's as bad but you don't really care. You know, everyone talks about dying as though it were the ultimate wrong. Living is much harder than dying. Dying is an end to pain, it's an end to responsibility. My client has had to live for three and a half years watching his family disappear, suffering, will have to live for the rest of his life with his condition which he did nothing to contribute to. You heard some nonsense, and I have to say nonsense, about "Did you take blows, get blows when you were playing football and did you lift up packages of weights from one to a hundred pounds?"

Well, I have done that and I have played football and I am not 235. I assure you if anywhere in this world there was a record of my client being injured or disabled or being treated for any injury or anything wrong with his back or neck it would have been brought before you. There is nothing. The cause of these injuries, plainly and exclusively, was this accident. The man goes to work and, as he told you, he worked eight to 24 hours a day sometimes. The only overtime he got was Saturdays and Sundays. He worked 24 hours a day regularly, and he didn't get paid for it.

I am forgetting about Mrs. Chiarello. I am forgetting

one other thing. For the next 32 years, I ask that you award my client the sum of $50,000 a year, and that is because of the fact that he really is not going to experience the pain to that degree. He is not going to care and when you stop caring things don't bother you as much, but he is going to hurt and he is going to hurt a great deal.

Mrs. Chiarello, well, Mrs. Chiarello by stipulation was admitted to be 32 going on 33. When the accident happened she was 28 years old. She had a good relationship with her husband, her husband had a good relationship with his children. As a result of this accident Mrs. Chiarello has a fourth child, a husband she has to take wherever he has to go, a husband who is impossible to live with, who is irritable, irrational, who brings none of the joys of the child. All children bring problems but they bring joys as well. This fourth child only brings trouble and sorrow. She has got to give up her life, a part of every woman's life, her sexual nature. She has had to sublimate herself to the point where she can tell you now that there is a void in her life but she no longer cares about it. She told you that for two years it bothered her terribly but she has had to make herself accept this, and you think from your own experience what this would do to you. Mrs. Chiarello, she's there. She is a young, good looking woman. What choice did

she have? She could become an adultress, give up her marriage or give up sex. She chose to give up sex. I say to you Mrs. Chiarello's life has been changed. She is now doing her husband's work, she has now given up a substantial part of her life. She has problems to face that would never have happened. I don't mean the work. I mean problems with the raising of the children, with the taking care of the family, with the fact that after this accident she had to go to work to support the family, which she should do. I ask you, in view of the permanent, total destruction of this marriage in certain aspects, to award Mrs. Chiarello a million dollars. I ask you to award Mr. Chiarello the sums I asked of you, and I am not kidding. It's a lot of money. I don't even know what Mr. Chiarello can do with the money but it's his due. Maybe somewhere he can find some way to help himself. $10,000 medical, $55,000 past loss of earnings, $615,000 future loss of earnings, $750,000 past pain and suffering, and $3,200,000 future pain and suffering. You make your own calculations, you people. You have heard Dr. Kaplan testify, a doctor whose qualifications are so good that Mr. Schultz didn't even want you to know what they were. That's why the qualifications were waived. There is the key man in this case. He is the one who told you the kindof pain Mr. Chiarello is suffering. He is the man who

told you that the only foreseeable hope of relief is a cordotomy, a severance of the spinal cord. Thank you.

THE CLERK: Ladies and gentlemen, the Court is about to charge the jury. If there are any spectators who wish to leave the courtroom they may do so now or wait until the completion of the Court's charge.

Will the marshal please lock the door.

THE COURT: Mr. Lanier, ladies and gentlemen of the jury: we have now reached the point in this trial where you are about to enter upon your final function as jurors, which is, of course, one of the sacred duties of citizenship.

You have given careful attention to the evidence during the course of the trial and I am certain you will conduct your deliberations in the same fine spirit that you have so far displayed, and with impartiality and fairness reach a just verdict in this case.

In our court system the function of the judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is and it is your duty to accept the law as I charge it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses and the weight and effect to be given to the evidence.

It is up to you to determine what the facts are from the evidence in this case and from those facts decide whether the plaintiffs have sustained their burden of proof on the claims which they have presented against the defendants.

Thomas J. Ciarello, one of the plaintiffs, seeks to recover damages from the defendants Domenico Bus Company and its employee, Henry Girdwood for injuries which Chiarello claims he suffered on June 30, 1972, because of the negligence of Girdwood in driving the bus owned by Domenico.

Chiarello claims that as a result of these injuries he has already lost substantial income and incurred considerable pain and suffering which he asserts will continue in the future.

I should point out to you ar this time that the owner of the bus is responsible for injuries caused by the negligence of its driver and that in this case, if Girdwood is found to have been negligent, then the Domenico Bus Service as well as Girdwood is liable for these damages.

Of course, if you find that Girdwood was not negligent in the operation of the bus, then neither defendant is liable to the plaintiffs.

Plaintiff Angela Chiarello, Thomas Chiarello's wife, seeks to recover damages from Domenico for loss of

consortium due to injuries suffered by her husband which she claims resulted from Girdwood's negligence.

While a claim for loss of consortium by Mrs. Chiarello is made only against the bus company, it cannot be liable for such damages unless you first find that the injuries complained of were the result of the negligence of the bus driver Girdwood.

Both defendants claim that Girdwood was not negligent in the operation of the bus and, even if he were negligent, that Thomas Chiarello's injuries are not as severe as claimed.

This trial has been a short one, and you have just heard the summations of counsel, in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in their favor. I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

In determining the issues in this case, it is your recollection of the testimony that is to control and not that of either counsel.

Statements made by counsel in arguing the admissibility of proposed evidence and colloquies between the Court and counsel with respect to admission or rejection of such evidence are not evidence and are not to be considered by you in your deliberations.

The summations of counsel which you just heard are not to be considered as evidence but only as arguments to you as to what counsel feel you should find from the evidence.

If, during the course of this trial, the Court sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question.

If a question has been asked and an answer has been given by a witness and I have then stricken the answer from the record, you are to disregard both the question and the answer in your deliberations.

The only evidence you can consider is sworn testimony and documents which have been admitted into evidence.

In this case, there is no question that in the early evening of June 30, 1972, the bus owned by Domenico and driven by Girdwood collided with the rear end of Chiarello's automobile, which was standing still at the time.

However, the mere fact that an accident occurs is not evidence of negligence and does not mean that the plaintiffs are entitled to recover money damages.

The burden of proof in this case is upon the plaintiffs.

In order for you to return a verdict in favor of

either of them, you must find that each has proved by a fair preponderance of the evidence:

First, that Girdwood was negligent in the manner he operated the bus; and second, that his negligence was the proximate cause of the accident.

Negligence has been defined by our courts as the absence of due care in doing or in failing to do an act which results in injury to someone to whom a duty of care is owed.

Due care is such care as the ordinary, reasonably prudent person would use under the same or similar circumstance.

In this type of case, Girdwood owed a duty of care to the plaintiff to operate his bus as the ordinary, reasonably prudent person would under the circumstances as they existed at the time, having due regard to the position of the preceding vehicle and the traffic upon and conditions of the highway.

The traffic regulations in effect at the point where the accident occurred provide that each vehicle shall maintain a safe and prudent distance behind the vehicle immediately preceding it in the same lane. If you find that the defendant violated this regulation, then Girdwood has breached his duty of care to the plaintiff and was negligent.

Plaintiffs must further establish by a fair prepon-

derance of the evidence that the negligence of the defendant was the proximate cause of the accident.

To constitute proximate cause, not only must the cause actually contribute to the result but such a cause must not be a remote one. It is a cause which in the natural and continuous sequence, unbroken by any efficient intervening cause,helps produce the injury and without which the accident would not have happened.

A fair preponderance of the evidence is no more than the greater weight of the evidence, and this weight is determined by the quality, not the quantity, of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of any party.

If the evidence is evenly balanced in your mind, then the plaintiffs have not sustained their burden of proof and your verdict must be for the defendants.

If you determine that the injury complained of was proximately caused by the negligence of Girdwood, then and then only will you consider the amount of money plaintiffs are entitled to receive to compensate them for the injuries they sustained.

In determining damages in a personal injury case, the law, insofar as possible, attempts to award a just and fair compensation for a loss which directly and naturally

flows from a wrong done by a defendant to a plaintiff. The damages awarded must be purely compensatory and neither inadequate nor excessive.

The damages should include such sums that you would find would compensate Mr. Chiarello for pain and suffering, for loss of earnings, and medical expenses which he has shown by a fair preponderance of the evidence were suffered as a result of this accident.

Pain and suffering shall include both pain and suffering in the past up to the present, and such pain and suffering as you believe from the evidence he is likely to experience in the future, taking into account the nature and extent of his disability.

If you believe that the pain and suffering will be permanent, you may take into consideration the life expectancy of the plaintiff. The plaintiff is presently 39 years old and has a life expectancy of about 32 years. Life expectancy is merely a statistical average and expresses what may be the reasonably expected number of years to which a person of a certain age may live.

You are entitled to find a lesser number of years if you believe that because of Mr. Chiarello's physical condition, unrelated to the accident, he may not be expected to live for the entire 32 years.

gw/lf 731

Obviously, the amount to be awarded for pain and suffering and the nature of the injury cannot be determined with mathematical certainty. However, the amount of the award must be based on fact and not merely conjecture or speculation.

Under no circumstances are you justified in making an award to a plaintiff simply because he may have been seriously injured, or from a feeling of sympathy, or a desire to give him something.

Plaintiff has submitted proof that he expended about $5600 for doctors' services and about $4000 for hospital bills, making a total of $9600. Although the defendants have not controverted these payments, the reasonable value of these services is a matter you must determine. Loss of earnings falls into two categories, loss of earnings to date and future loss of income, if any, should you find the earning capacity of the plaintiff has been impaired either entirely or diminished in part. One who has been injured by the negligence of another must make a reasonable attempt to minimize damages by resuming gainful employment as soon as he reasonably can. As to loss of earnings, the plaintiff clearly has testified that at the time of the happening of the accident he was earning approximately $16,000 a year and he has not been able to work since the

BEST COPY AVAILABLE

day of the accident on June 30, 1972, and this is a little over three and a half years. However, he has admitted that he did receive his salary for the first six months until December 31, 1972.

You have also heard testimony that his company now pays $19,500 a year for similar work. You may use this amount that he was earning at the time of the accident as well as the present salary as some indication of his future loss of earnings. If you find that the injuries attributable to the accident are permanent and that his future earnings will thereby be affected, you must consider in arriving at the amount of damages you will award him for future loss of earnings his age, which is 39, his physical condition at the time of the accident, the type of employment before the injury, any employment he may engage in in the future, his work expectancy, which is 26 years.

As I have already indicated to you, you may find that his work expectancy is less than 26 years, which is when he will reach the age of 65, taking into consideration his physical condition aside from any limitations caused by the accident itself.

The plaintiff Angela Chiarello claims damages for what is called her loss of consortium. Consortium is a concept that is more difficult to explain than to understand.

Here, consortium means the aid, comfort and conjugal fellowship of a marital relationship. It includes the affection, warmth and emotional support of the relationship, as well as the sexual relationship between the spouses.

It is all the things that make a marriage different from a friendship, blended into a conceptual unity.

If you find, by a fair preponderance of the evidence, that Girdwood was negligent, that his negligence caused the accident, and that as a result Angela Chiarello has suffered a loss of her consortium, then you must find against Domenico Bus Company in an amount that will compensate Angela Chiarello for this loss.

Just as in the case of damages for pain and suffering, the amount to be recovered cannot be determined with mathematical precision in the application for loss of consortium. However, the amount awarded, if any, must be based on fact. You must not make an award to Angela Chiarello based on sympathy or a desire to give her something, but only on the basis of an actual loss that you find to have occurred and on which you have placed a specific value.

As to the duration of the loss, should you find it exists, you may consider possible improvement in the relationship of the spouses, as well as the 32 year life expectancy of Thomas Chiarello. You may award damages for the past as

well as future loss of consortium.

The law recognizes the principle of the present value of a dollar, which is recognition of the fact that a lump sum of money received today is worth more than the same amount of money paid in installments over a period of time. This is so because a lump sum can be invested and earn interest over a period of years. Usually the mathematical computations are left to the jury. However, counsel have agreed with the Court that you not engage in this effort but need only answer the questions which will be submitted to you in writing before you retire to deliberate the issues in this case. The Court will make the necessary computations based on your answers to the questions.

In answering the question as to what the rate of interest should be, that rate should be one which can fairly be expected from reasonably safe investments made by a person of ordinary prudence who does not have particular financial skill or experience.

In answering the question as to what the possible rate of inflation may be in the future, the only proof before you was given by Professor Seplaki. He testified a six percent rate of inflation could be expected in the future. This may be used as a guideline in arriving at the answer to the question, but the answer to the question is solely

within your discretion.

In your search for the truth you must use plain, everyday common sense. You must not be governed by sympathy, bias or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. How did they impress you? Did they appear to be testifying frankly and candidly? In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying, and his interest in the outcome of the litigation. The plaintiffs, of course, are interested witnesses, as is Henry Girdwood, both on his own behalf and as an employee of Domenico Bus Company.

You may consider these facts in determining the weight and credibility of their testimony. However, it does not necessarily follow that because a person is interested in the result he is not capable of telling a truthful version of an occurrence.

If you believe that a witness willfully testified falsely as to any material fact, you may disregard his testimony altogether or you may accept such portion of his testimony as you believe worthy of credence, but what you accept or reject as credible testimony is for you to determine, but you may not go outside the evidence to speculate as to the facts.

Inconsistencies and contradictions appearing in the testimony may or may not be explainable; so, too, they may be willful or inadvertent, deliberate or innocent, major or minor.

A prior inconsistent statement which has been made under oath may be considered by you both as affirmative proof of the facts contained in it and as well impeaching the credibility of that witness.

It is for you to appraise the significance of any inconsistencies and contradictions in relation to the credibility of the witness. Various hospital records have been introduced in evidence. The facts contained in them are evidence for you to consider. The credibility and the weight that you give to them is solely within your discretion.

Now, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence. This is the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. Circumstantial evidence is the proof of facts from which the fact in issue may reasonably be inferred.

You may draw such inferences as reason and common sense lead you to draw from the facts which you find to have

been proven. Circumstantial evidence is not in any different or lower plane than direct evidence. No greater degree of certainty is required of circumstantial evidence. The law simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You have heard the testimony of doctors called on behalf of both parties. How do you, as laymen, determine the facts from medical testimony? You are to act in exactly the same way that you would appraise and determine the testimony of an ordinary witness, as I have already outlined for you. Ordinary witnesses are allowed to tell you only what they see, hear or experience. Experts such as the physicians who were called are permitted to also tell the jury their opinions by reason of their training and knowledge in their particular field. As you well know, an opinion is something a witness forms in his own mind based on specific facts from which, using his judgment, training and experience, he draws certain conclusions. Of course, if you don't believe the facts which form the basis of the expert's opinion, then his opinion is valueless, but otherwise you would treat an expert's opinion as evidence which you have heard. You may accept his opinion or you may reject it in whole or in part. It is entirely up to you as to what you will do with it

as testimony and what credibility you will give to it.

I have sought to avoid any comments which might suggest I have personal view on the evidence. I have no views on the facts of this case and you are not to assume that I have any such views. This charge is given to you solely to instruct you as to the law applicable to this case.

The actions of the judge during the trial in ruling upon motions or objections by counsel or in statements to counsel or in attempting to clearly set forth the law in these instructions are not to be taken by you as any indication of the determination of any of the issues of fact. These matters, the actions of the Court, relate to procedure and law. You and you alone determine the facts.

There are six members of this jury and all of you must agree upon a verdict. If you should desire any of the exhibits they will be sent to the jury room upon request. If you want any of the testimony or any portion of this charge read, that also can be done upon your request.

The case is obviously an important one to the plaintiffs, it is equally important to the defendants. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide this case fairly and impartially and without fear or favor.

If there are any exceptions to the charge, I will

take them in the robing room.

MR. SCHULTZ: Yes, sir.

(In the robing room)

MR. SCHULTZ: I assume when you said exceptions you meant requests, too?

THE COURT: No, I don't take requests. I take exceptions to the charge. Requests are to be submitted in advance. You can except to what I charged.

MR. SCHULTZ: I will except to your Honor's portion of the charge wherein your Honor stated that the plaintiffs have the burden of proof in establishing that the defendants' negligence was the proximate cause of the accident, because it is my contention, sir, that in addition to that the plaintiffs have the burden of proof of establishing that the defendants' negligence was also the proximate cause of the injuries claimed. You did not insert that in your charge, sir.

THE COURT: I think later on you will find that I speak about proximate cause with relation to injuries proximately resulting from the accident.

Go ahead.

MR. SCHULTZ: And, if your Honor please, I certainly couldn't make this request until I knew what the charge was. I respectfully request you charge the jury the mere fact you talk about damages and how they should compute them does not

indicate that you feel they are entitled to recover.

THE COURT: I never give that charge, Mr. Schultz.

MR. SCHULTZ: Now, your Honor, with the utmost respect, the attorney for the plaintiff -- you told me to make this in the absence of the jury outside. The attorney for the plaintiff kept referring to the fact about placing the jurors in the shoes of a litigant. He said to the jurors, "How would you operate your car under these circumstances? You would be scared to death of an operation of this sort."

He was comparing pain, saying to the jurors, "The pain that you have experienced."

If your Honor please, I have read many cases that said that you are not to place the jurors in the shoes of a litigant.

THE COURT: On the other hand, you can'tpossibly tell a juror to leave his common sense at the courthouse door. Obviously this is the whole purpose of the jury system, that they bring to bear their experience in the past in determining the facts as they have to determine them. So your objections to what Mr. Lassoff said are overruled. I think all his comments were fair comment, especially since you made an unveiled charge that Mr. Lassoff was the architect of a phony case here.

MR. SCHULTZ: I didn't say that he was, sir.

THE COURT: That was my inference from listening to you, and I am sure the jury got it.

MR. SCHULTZ: I didn't say he did. I said there was some architect.

THE COURT: I know you didn't say he did it, but the inference was clearly he did it, in view of your cross examination of each one of the plaintiffs' witnesses as to their talking with Mr. Lassoff and going over this case in preparation for their testifying.

I think that that was the inference I drew from it, it's an inference the jury could have drawn from it. But you did it and you are right, if you wish to.

MR. SCHULTZ: If your Honor please, I don't think that that is the issue at hand of placing the jurors in the position --

THE COURT: I have already ruled that it is perfectly proper in a summation to ask a juror to call upon his experience in determining the issues in this case. In fact, many of my colleagues put in the charge that you don't leave your common sense and experience at the courthouse door. I don't put it in.

MR. SCHULTZ: I respectfully except to your overruling the objections, if your Honor please, and I am not saying that is what the issue is. I am saying it is improper

to place the jurors in the shoes of a litigant.

THE COURT: And I am saying Mr. Lassoff's comment was proper.

MR. SCHULTZ: Thank you, your Honor.

(In open court)

THE CLERK: Will the marshal please step forward.

THE COURT: Before we swear the marshal, Mr. Studemier, we thank you for being with us up to this point, but you do not participate in the deliberations of the jury. So if you have anything in the jury room, would you go in and get it, and you are excused with the thanks of the Court. The clerk here has your certificate of service. I hope a check follows shortly.

Come up here, Mr. Marshal.

(Marshal sworn)

THE CLERK: Ladies and gentlemen, please remain seated until the jurors leave the courtroom.

THE COURT: All right, Mr. Lanier and ladies and gentlemen of the jury, you may follow the marshal to the room in the back and start your deliberations.

I have the questions.

(At 4:10 p.m., the jury retired to deliberate.)

(At 5:10 p.m. - in the robing room)

THE COURT: I will send this note in to the jury if

you agree.

"Do you think you can reach a verdict in this case by 5:30 p.m.? If not, I will allow you to go home and return tomorrow morning at 10:00 a.m. to resume your deliberations."

MR. SCHULTZ: I have no objection, your Honor.

MR. LASSOFF: No objection.

(Pause)

THE COURT: What does this mean? Agreed what? Agreed they will have a verdict by 5:30 or they want to go home?

THE CLERK: They indicated to the marshal they couldn't agree.

THE COURT: There is a note:

"On Question b. May we allow X amount of dollars to accrue at five anda half percent to pay him the salary of $19,500 for 26 years? Do we have this right?"

Go back and get an answer to this that makes sense.

The question reads as follows: "On Question b, may we allow X amount of dollars to accrue at five and a half percent to pay him the salary of $19,500 for 26 years? Do we have this right?"

Question b reads: "What amount, if any, do you find for lost future earnings?"

And that merely requires a multiplication of whatever amount they think he is going to earn. That's gross, b.

The question of what is the discount figure and what is the inflation figure comes later on.

MR. LASSOFF: Right, your Honor.

THE COURT: B is merely a gross amount so that the computations may be made.

Actually, you subtract, I assume, the inflation rate from the discount rate.

MR. LASSOFF: Correct, whatever they find it to be.

THE COURT: If they come out even, then you take the gross figure.

Off the record.

(Discussion off the record)

THE COURT: No, they can't agree.

Why don't I bring them back and answer this question and then discharge them until tomorrow morning at ten o'clock?

MR. SCHULTZ: Yes, sir.

MR. LASSOFF: Your Honor will answer it, "You figure the gross figure and the rates come later?"

THE COURT: B calls for a gross figure.

(Court's Exhibit 1 marked)

xxx

(In open court)

THE COURT: Mr. Lanier and ladies and gentlemen of the jury: you have indicated to the Court that you don't think you can reach a verdict by 5:30 and, consequently, I will allow you to go home. It isn't very nice out. I don't want to keep you overnight.

I let you go home on two conditions, (a), you don't talk to anybody when you get home, your husband and wives; (b), you promise to be here tomorrow, otherwise you have aborted the whole proceedings. On those conditions I will let you go home until tomorrow morning at ten o'clock.

You also sent me a note which I thought I might answer for you before you go home.

The note reads:

"On question b may we allow X amount of dollars to accrue at five and a half percent to pay him a salary of $19,500 for 26 years? Do we have this right?"

The way we framed it is for you to give us gross figures and I will do the working out for you, because there is a formula involved that gets complicated.

So item b asks you to give a gross figure, how much you think you would award the plaintiff for future loss of earnings per year multiplied by the 26, if you think he is entitled to the 26 years experience.

Then later on, of course, you note there is a question what rate do you give for inflation and what rate do you allow for the discount value. You just fill the figures in and I will do the working out. So, therefore, item b is a figure, gross figure, of the amount of money you think the plaintiff will lose each year in the future for the number of years that you wish to give it to him. Your note says 26 years. So whatever figure you want to give him per year, you can multiply by the 26. That is a gross figure. That is all b calls for. Later on you will give me the percentages as to what you find is the inflationary rate you want me to apply and you also give me the discount figure you want me to apply. Those you do later.

I hope you don't have too much trouble getting home. See you tomorrow morning.

(Jury leaves the courtroom at 5:22 p.m.)

THE COURT: Actually this should be Court Exhibit 1, the yellow one, and the one they sent back should be Court Exhibit 2.

xxx (Court Exhibit 2 marked.)

THE COURT: Yes, Mr. Schultz. Did you want to ask something?

MR. SCHULTZ: I wanted to wait until the jury was out, your Honor.

If your Honor please, I don't think your Honor intended it but you indicated that they were to multiply the amount they found each year by 26 is what you said.

THE COURT: Or whatever figure they saw fit.

MR. SCHULTZ: If your Honor please, I would respectfully except to that, if your Honor please, or perhaps you could clear it up with an explanation, because the next letter is number c which is: "What is Thomas Chiarello's work expectancy in years?"

So I would respectfully request that you tell them that they are just to put a gross figure in b and then put the work expectancy in c rather than any multiplication.

THE COURT: No. I think if there is an inconsistency we can worry about that when it comes in.

MR. LASSOFF: The note that the jury sent in did state 26 years at nineteen-five a year.

THE COURT: They said 26. They can give less than 26 if they wish, and I told them they could give less.

MR. SCHULTZ: I would respectfully request that that be cleared up tomorrow. That wasn't clear to me.

THE COURT: I think it was clear enough, Mr. Schultz.

MR. SCHULTZ: I respectfully except, your Honor.

(Adjournment to 10:00 a.m., March 10, 1976.)

Metzner

THOMAS J. CHIARELLO and
ANGELA CHIARELLO,

Plaintiffs,

vs.

73 Civ. 2962
75 Civ. 1956

DOMENICO BUS SERVICE, INC.,
and HENRY GIRDWOOD,

Defendants.

March 10, 1976

xxx (Court Exhibit 3 marked)

"Hospital records from Golden Isles. Also rhizotomy operation report. Also Dr. Kaplan's medical report."

xxx (Court Exhibit 4 marked)

"Mr. Chiarello's children's age."

(At 3:05 p.m., the jury returned to the courtroom.)

THE CLERK: Ladies and gentlemen of the jury, I am about to take a roll call. Please answer as your name is called.

(Roll called)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: We have, sir.

THE CLERK: How do you find?

THE FOREMAN: We find for the plaintiff.

THE CLERK: Mr. Lanier, I will read the question. Do you want to give me the answers. From the questions

his Honor gave you.

THE COURT: Just read them off.

I will take it the way it is, I will read the answers. You have copies of the questions, counsel.

A is $55,000.

B is $507,000.

C is 26 years.

D is $138,500.

E is $230,000.

F is 32 years.

G is $10,000.

H is $38,000.

I is $70,000.

J is 6.50.

K is 3 percent.

Pursuant to an agreement with counsel, I will work out and show to counsel my computations based on those figures.

May I see counsel at the Bench?

(At the side bar)

THE COURT: Do any of you have any question as to the verdict in the sense that it's not clear to you?

MR. SCHULTZ: The only thing -- I still don't understand it and I should have raised it before. What is the importance of C?

THE COURT: Of c?

MR. SCHULTZ: Yes. They have already computed his lost future earnings.

THE COURT: Because they have to tell me what the figure is for the purpose of discounting.

MR. SCHULTZ: All right.

THE COURT: I told them that b is merely what they figure per year times the number of years and they give us the number of years separately. You need that figure separately.

MR. SCHULTZ: That I understand.

THE COURT: Anything else?

MR. SCHULTZ: No.

MR. LASSOFF: I have nothing, your Honor.

MR. SCHULTZ: So you have to do the discounting.

THE COURT: I will do that. By communication I can let you know of an order I will give to the clerk so he can enter judgment.

MR. SCHULTZ: I assume I can figure this out myself, too.

THE COURT: If you disagree with it you let me know. All right?

MR. SCHULTZ: All right. In the meantime, your Honor --

THE COURT: Do you want to make motions after I discharge the jury?

MR. SCHULTZ: Yes, please.

(In open court)

THE COURT: Mr. Lanier and ladies and gentlemen of the jury, you have given very careful attention to the testimony that was adduced from the witness stand during the last five days, and that's what our American system of justice is all about. You obviously have spent some six hours in deliberations and came to a conclusion as to what in your mind the damages should be. That also is your function and in view of the fact that you have devoted the time that you have to this case, you are excused from any further service as jurors. The clerk has your certificates.

You may be called upon in two years again but I think we revised the jury list in the meantime so you may not find your names on it.

Thank you very much.

(Jury left the courtroom)

THE COURT: All right, Mr. Schultz.

MR. SCHULTZ: First of all, if your Honor please, I respectfully request a 30 day stay and 60 days to make a case, your Honor.

THE COURT: Application is granted.

MR. SCHULTZ: If your Honor please, at this time I respectfully move to set the verdict aside, if your Honor please, first on the ground it is excessive, further ground, your Honor, it is contrary to the weight of the evidence and on all the applicable rules of the Court, your Honor.

THE COURT: Decision on the motions reserved until the Court makes its computations and notifies counsel by the entry of an order.

Thank you very much.

MR. LASSOFF: Thank you, your Honor.

(Time noted: 3:15 p.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Thomas J. Chiarello	24			
(Resumed)	250	302		
		334	363	366
Arthur Friedman	91	124	149	152
Samuel P. Leone	154	171	210	216
John Allen Hutchings	220	226	230	244
			248	
L. Jackson Spitz	275	287	300	
Joseph Edward DeVoy	330			
(Resumed)	367			
Les Seplaki	371	380	389	
"Henry Girdwood	391			
Lawrence I. Kaplan	409	444	468	
Angela Chiarello	472			
Edward M. Gould	487	501	526	
Duke Barnett Baird	528	564		
HENRY D. Girdwood	595	662		

Plaintiff	Identification	In Evidence
1	36	233
2,3,4		62
5		72
6		79
7		86
8		123
9	235	236
10	237	629
11	237	239
12		252
13,14		269
15		411
15A,15B		568
16		426
16A,16B,16C		428
Defendant		
A		546
B	603	604
C	662	
Court		
1	744	
2	746	
3,4	748	

Plaintiff's Request to Charge.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc., and HENRY GIRWOOD,

Defendants.

Action No. 1

73 Civ. 2962

ANGELA CHIARIELLO,

Plaintiff,

against

DOMENICO BUS SERVICE, Inc., and HENRY GIRWOOD,

Defendants.

Action No. 2

75 Civ. 1956

Request to Charge.

Since the above entitled accident is a simple automobile accident made even simpler because the defendant's complaint of contributory negligence has been withdrawn,

plaintiff has only one request to charge and this request deals with the Traffic Rules, Regulations and Toll Rates established by the Port Authority of New York and New Jersey with regard to traffic on the Bayonne Bridge.

1. Plaintiff specifically requests that Your Honor charge Paragraph 3.2 of said Traffic Regulations which states: "Each vehicle shall maintain a safe and prudent distance between the vehicle immediately preceding it in the same lane."

Grant

Respectfully submitted,

MARTIN LASSOFF
Attorney for Plaintiff in Action
No. 1 and Action No. 2.
160 Broadway
New York, New York 10038

Plaintiff's Second Part of Request to Charge.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARIELLO,

Plaintiff,

against

DOMENICO BUS Co. Inc. and HENRY GIRWOOD,

Defendants.

73 Civ. 2956
Judge Metzner

1. Section 39.89 of the New Jersey Motor Vehicle and Traffic Regulations states:

> "The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent having due regard to the speed of the preceding vehicle and the traffic upon and condition of the highway."

If you find that the defendant was following more closely than was reasonable, you shall find that the defendant was negligent and you must bring in a verdict for the plaintiff. *Dolson v. Anastasia*, 55 N. J. 2, 258 A. 2d 706 (1969).

Not Applicable

2. Section 39.4-97 of the New Jersey Motor Vehicle and Traffic Regulations states:

> "A person who drives a vehicle on a highway carelessly or without due caution and circumspec-

tion in a manner so as to endanger or be likely to endanger a person or property shall be guilty of careless driving."

If you find that the defendant so operated his vehicle as to constitute carelessness under this statute, you must find for the plaintiff. *Dolson v. Anastasia, supra.*

Not Applicable

3. Section 39.4-98 of the New Jersey Motor Vehicle and Traffic Regulations, subparagraph (c) states in part:

"* * * the driver of every vehicle shall * * * drive at an appropriate reduced speed when * * * special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions."

If you find that the defendant operated his vehicle so as to violate this section, you may find for the plaintiff. *Warren v. Haines,* 126 F. 2d 160, cert. denied 62 U. S. 688.

Not Applicable

Respectfully submitted

MARTIN LASSOFF
Attorney for Plaintiff

Defendants' Requests to Charge.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS J. CHIARELLO,

Plaintiff,

against

DOMENICO BUS CO. Inc. and HENRY GIRDWOOD,

Defendants.

Action No. 1

73 Civ. 2962

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS CO. Inc and HENRY GIRDWOOD,

Defendants.

Action Number 2

75 Civ. 1956

Requests to Charge

It is respectfully requested that the Court charge as follows:

1. The mere happening of an accident does not give rise to an inference that the defendants were negligent.

D Ex Ch

Defendants' Requests to Charge

2. The plaintiffs may not recover unless it is proven by a fair preponderance of the credible evidence that the defendants' negligence was the proximate cause of the occurrence complained of and the injuries allegedly sustained.

D Ex Ch

3. An act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as a cause of the injury.

4. The fact that the defendants' vehicle struck the plaintiffs' vehicle which the defendant Henry Girdwood had been following is a circumstance to be considered in determining whether defendant Henry Girdwood exercised reasonable care but standing alone it does not require that you find the defendant Henry Girdwood negligent.

Denied

5. A person faced with an emergency and who acts, without opportunity for deliberation, to avoid an accident may not be charged with negligence if he acts as a reasonably prudent person would act under the same emergency circumstances, even though it appears afterwards that he did not take the safest course or exercise the best judgment. Mere error of judgment or wrong choice of action is not negligence when one is called upon to act quickly in the face of peril. Within the meaning of this rule a person is faced with an emergency when he is confronted by a sudden and unforeseen condition not brought about or contributed to by his own negligence.

Deny

Defendants' Requests to Charge

If you find that defendant Henry Girdwood was faced with an emergency and that his conduct was reasonable in the light of the emergency circumstances confronting him, your finding will be that defendant Henry Girdwood was not negligent.

6. Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances.

7. If you find that the occurrence complained of was occasioned as a result of an unavoidable accident then you must find for the defendants.

Denied

Respectfully submitted,

MacCarthy, Schultz & Mulholland
Trial Counsel to:
Daniel J. Coughlin
Attorney for Defendants in Action Number 1 and Defendant Domenico Bus Service, Inc. in Action Number 2
Office and P. O. Address
225 Broadway
New York, New York 10007
By: John A. Schultz
A Member of the Firm

Plaintiffs' Exhibit 1.

Photograph.

(See opposite page.) ☞

Plaintiffs' Exhibit 9.

Photograph.

(See opposite page.) ☞

Plaintiffs' Exhibit 10.

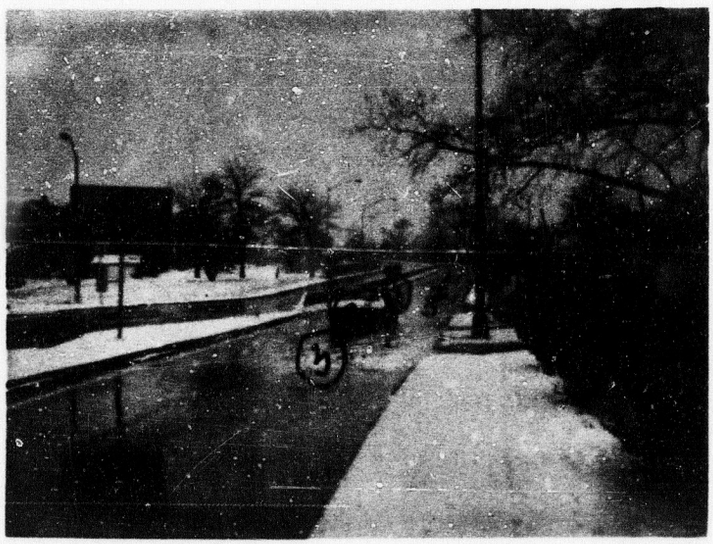
Photograph.

(See opposite page.) ☞

Plaintiffs' Exhibit 11.

Photograph.

(See opposite page.) ☞



Questions Submitted to Jury.

If you find that Girdwood and Domenico should pay damages to the plaintiffs under the guidelines I have given you in the charge, then answer the following questions:

a. What amount, if any, do you find for lost past earnings? $55,000.00

b. What amount, if any, do you find for lost future earnings? $507,000.00

c. What is Thomas Chiarello's work expectancy? 26 years.

d. What amount, if any, do you find for past pain and suffering? $138,500.00

e. What amount, if any, do you find for future pain and suffering? $230,000.00

f. What is Thomas Chiarello's life expectancy? 32 years.

g. What amount, if any, do you find for past medical expenses? $10,000.00

h. What amount, if any, do you find for Angela Chiarello's claim for past loss of consortium? $38,000.00

i. What amount, if any, do you find for Angela Chiarello's claim for future loss of consortium? $70,000.00

j. What rate do you find for reasonable interest on investments? 6.50 per cent.

k. What rate do you find for inflation? 3 per cent.

s/ JOHN LANIER (Foreman)

Memorandum by Metzner, D. J., Denying Defendants' Motion to Set Aside Verdict and Directing Entry of Judgment (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS CO. Inc. and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962

During the course of the trial of the above matter, counsel agreed that questions would be submitted to the jury to determine the various items of damage found by the jury in the event that a verdict should be entered in favor of the plaintiff. The calculation of the total damages was reserved to the court.

The jury found a discount rate of 6½ per cent for the present value of the dollar, and an inflation rate of 3 per cent, making a net discount factor of 3½ per cent.

The jury found that Mr. Chiarello's work expectancy was 26 years and his life expectancy 32 years.

Memorandum by Metzner, D. J., Denying Defendants' Motion to Set Aside Verdict and Directing Entry of Judgment (Action No. 1)

The jury found a verdict in favor of the plaintiff which results in damages in plaintiff's favor as follows:

1. Lost earnings		$ 55,000.00
2. Loss of future earnings	$507,000	
Discounted by 3½ per cent for 26 years		329,362.00
3. Past pain and suffering		138,500.00
4. Future pain and suffering	$230,000	
Discounted by 3½ per cent for 32 years		137,048.00
5. Medical expenses		10,000.00
	Total	$669,910.00

Defendants' motions to set aside the verdict are denied.

Judgment shall be entered in the sum of $669,910 with a stay of execution for thirty days.

So ordered.

Dated: New York, N. Y.
March 11, 1976

CHARLES M. METZNER
U. S. D. J.

Judgment (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962
Judgment #76,222

During the course of the trial of the above matter, counsel agreed that questions would be submitted to the jury to determine the various items of damage found by the jury in the event that a verdict should be entered in favor of the plaintiff. The calculation of the total damages was reserved to the court.

The jury found a discount rate of 6½ per cent for the present value of the dollar, and an inflation rate of 3 per cent, making a net discount factor of 3½ per cent.

The jury found that Mr. Chiarello's work expectancy was 26 years and his life expectancy 32 years.

Judgment (Action No. 1)

The jury found a verdict in favor of the plaintiff which results in damages in plaintiff's favor as follows:

1. Lost earnings		$ 55,000.00
2. Loss of future earnings	$507,000	
Discounted by 3½ per cent for 26 years		329,362.00
3. Past pain and suffering		138,500.00
4. Future pain and suffering	$230,000	
Discounted by 3½ per cent for 32 years		137,048.00
5. Medical expenses		10,000.00
	Total	$669,910.00

Defendants' motions to set aside the verdict are denied.

Judgment shall be entered in the sum of $669,910 jointly and severally with a stay of execution for thirty days.

So ordered.

Dated: New York, N. Y.
March 11, 1976

CHARLES M. METZNER
U. S. D. J.

Judgment Entered—3/17/76
RAYMOND F. BURGHARDT
Clerk

Defendants' Notice of Appeal (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS CO. Inc. and HENRY GIRDWOOD,

Defendants.

73 Civ. 2962

SIR:

Please Take Notice, that the defendants, Domenico Bus Service, Inc. and Henry Girdwood, do hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment entered in this Court by Charles M. Metzner, U.S.D.J., on the 11th day of March, 1976, which judgment adjudges that the plaintiff, Thomas Chiarello, shall recover of the defendants, Domenico Bus Service, Inc. and Henry Girdwood, the sum of $669,910.00, and the said defendants, Domenico Bus Service, Inc. and Henry Girdwood, do hereby appeal from the whole

of said judgment and from each and every part thereof on both questions of law and fact.

Dated, New York, N. Y.
April 8, 1976.

Yours, etc.,

DANIEL J. COUGHLIN
Attorney for Defendants
Office & P. O. Address
110 William Street
New York, N. Y. 10038
233-5010

To:

Martin Lassoff
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, N. Y. 10038
BA 7-1350

Plaintiff's Notice of Appeal (Action No. 1).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIBBWOOD,

Defendants.

73 Civil 2962
(J. Metzner)

SIR:

Please Take Notice that the plaintiff, Thomas Chiarello, does hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from so much of a judgment entered herein by Charles M. Metzner, U.S.D.J., on the 11th day of March, 1976, which reduces and discounts the damages for the future pain and suffering as found by the Jury, and in the manner employed by the Court in such discounting.

Dated: N. Y., April 12, 1976.

Yours, etc.

s/ MARTIN LASSOFF
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, N. Y. 10038
Tel. No.: BA 7-1350

To:

Daniel J. Coughlin, Esq.
Attorney for Defendants
110 William Street
New York, N. Y. 10038

Judgment (Action No. 2).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRDWOOD,

Defendants.

75 Civ. 1956
Judgment #76,223

During the course of the trial of the above matter, counsel agreed that questions would be submitted to the jury determine the various items of damage found by the y in the event that a verdict should be entered in favor the plaintiff. The calculation of the total damages was reserved to the court.

The jury found a discount rate of 6½ per cent for the present value of the dollar, and an inflation rate of 3 per cent, making a net discount factor of 3½ per cent.

The jury found that Mr. Chiarello's life expectancy is 32 years.

Judgment (Action No. 2)

The jury found a verdict in favor of the plaintiff which results in damages in plaintiff's favor as follows:

1. Past loss of consortium		$38,000.00
2. Future loss of consortium	$70,000	
Discounted by 3½ per cent for 32 years		41,703.00
Total		$79,703.00

Defendant Girdwood was never served with process and the action is dismissed as to him.

Defendant Domenico Bus Service, Inc.'s motion to set aside the verdict is denied.

Judgment shall be entered against Domenico Bus Service, Inc. in the sum of $79,703, with a stay of execution for thirty days.

So ordered.

Dated: New York, N. Y.
March 11, 1976

CHARLES M. METZNER
U.S.D.J.

Judgment Entered—3/17/76
RAYMOND F. BURGHARDT
Clerk

Notice of Appeal of Defendant Domenico Bus Service, Inc. (Action No. 2).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRDWOOD,

Defendants.

75 Civ. 1956

SIR:

Please Take Notice, that the defendant, Domenico Bus Service, Inc., does hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of a judgment entered in this Court by Charles M. Metzner, U.S.D.J., on the 11th day of March, 1976, which adjudges that the plaintiff, Angela Chiarello, shall recover of the defendant, Domenico Bus Service, Inc., the sum of $79,703.00, and which denies the defendant, Do-

Notice of Appeal of Defendant Domenico Bus Service, Inc. (Action No. 2)

menico Bus Service, Inc.'s motion to set the verdict aside, on both questions of law and fact.

Dated, New York, N. Y.
April 8, 1976.

Yours, etc.,

DANIEL J. COUGHLIN
Attorney for Defendant Domenico
Bus Service, Inc.
Office & P. O. Address
110 William Street
New York, N. Y. 10038
233-5010

To:

Martin Lassoff
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, N. Y. 10038
BA 7-1350

Plaintiff's Notice of Appeal (Action No. 2).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANGELA CHIARELLO,

Plaintiff,

against

DOMENICO BUS SERVICE Inc. and HENRY GIRDWOOD,

Defendants.

75 Civil 1956
(J. Metzner)

SIR:

Please Take Notice that the plaintiff, Angelo Chiarello, does hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from so much of a judgment entered herein by Charles M. Metzner, U.S.D.J., on the 11th day of March, 1976, which reduces and discounts the damages for future loss of consortium as found by the Jury, and in the manner employed by the Court in such discounting.

Dated: N. Y., April 12, 1976.

Yours, etc.

MARTIN LASSOFF
Attorney for Plaintiff
Office & P. O. Address
160 Broadway
New York, N. Y. 10038
Tel. No.: BA 7-1350

To:

Daniel J. Coughlin, Esq.
Attorney for Defendants
110 William Street
New York, N. Y. 10038